THE HUMAN IMMUNODEFICIENCY VIRUS (HIV) EMPEROR IS NAKED:

EXPOSING HIV STATUS-BASED CRIMINAL OFFENSES UNDER THE UCMJ

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We know that to err is human, but the HIV/AIDS hypothesis is one hell of a mistake.[2]

I. Introduction

A Marine and a Sailor walk into a bar.[3] The Sailor is the designated driver for a small group of men and stays sober the entire night. The Marine drinks for hours, to the point where he vomits outside, draws concern from the Sailor, and is mostly incoherent on the drive to the hotel, where he passes out, face-down, on a bed. The Sailor later tilts the Marine's head to the side to prevent him from choking in case he vomits again. He then briefly receives fellatio from the Marine before the Marine passes out again, face-down into the pillow. The Sailor then strips the Marine's clothes and anally penetrates him for 45 to 50 minutes. The entire time, the Marine never says a word and only moans a few times.

In this vignette, any judge advocate would be able to identify a Sailor accused who could be charged with sexual assault under Article 120, and perhaps forcible sodomy under Article 125 for sexually assaulting the Marine. But change the facts: the Marine was told several months ago that he is infected with the Human Immunodeficiency Virus, or "HIV." He's "HIV positive" now, and will be for life. Only his best friends know his "status" because of how serious and sensitive it is. He has to be careful with others, especially because he is a sexually active homosexual.[4] He's been counseled by a doctor at the Navy's HIV Evaluation Treatment Unit

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[2] Kary B. Mullis, *Foreword* to PETER A. DUESBERG, INVENTING THE AIDS VIRUS, at i (1996). Dr. Mullis received the Nobel Prize in Chemistry in 1993 for inventing Polymerase Chain Reaction (PCR). *Kary B. Mullis – Facts*, NOBELPRIZE.ORG, http://www.nobelprize.org/nobel_prizes/chemistry/laureates/1993/mullis-facts.html (last visited Mar. 7, 2015). PCR's significance to HIV testing is briefly discussed below. *See infra* note 110.

[3] This is not a joke. The facts presented in this scenario formed the basis of the charges in United States v. Corporal R. L., USMC (Marine Corps Logistics Base Barstow) (charges referred to general court-martial, but subsequently dismissed after a second Article 32 hearing). The author was detailed defense counsel for the accused.

[4] The event described here occurred a few months prior to repeal of the law prohibiting homosexuals from serving in the military and the subsequent modifications of the implementing service regulations. *See* Don't Ask, Don't Tell

that he has to notify any potential sexual partner of his HIV "status" and use protection during sexual activity. If not, he could infect someone with HIV, which causes Acquired Immune Deficiency Syndrome (AIDS) and death. He could also be punished under the Uniform Code of Military Justice (UCMJ) for exposing another to HIV. So when his friends later enter the room, they find him crying, naked, violated, shocked, confused, and scared. He feels like he's just been raped, but he does not report it. He fears *he* will be punished for it because he has HIV.

Now who is the criminal? To military authorities, the Marine was. The Naval Criminal Investigative Service investigated him. Military prosecutors charged him with violating the "safe sex" order of his doctor and—because his victim could not legally consent to sex with a person with HIV[5]—sexual assault and assault with means likely to produce death or grievous bodily harm, under Articles 92, 120, and 128.[6] The convening authority referred the charges to a general court-martial. But the government later dismissed the charges when the facts supporting the HIV elements—which seemed unassailable under the military's legal precedents—fell apart under close scrutiny.

Repeal Act of 2010, Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3515 (2010) (repealing 10 U.S.C. § 654). Incidentally, the Sailor claimed not to be a homosexual, but merely curious/questioning on the night at issue.

[5] The idea that a victim cannot legally consent to assault with a means likely to produce death or grievous bodily harm is well settled in the military. *See* United States v. Outhier, 45 M.J. 326, 330 (C.A.A.F. 1996) ("One cannot consent to an act which is likely to produce grievous bodily harm or death."). When applied to HIV cases, it has meant that apparently consensual sexual conduct could be charged as "by force and without consent" under a variety of UCMJ Articles because consent could not legally exist where HIV was involved. *See, e.g.*, United States v. Bygrave, 46 M.J. 491, 493 (C.A.A.F. 1997). CAAF's recent watershed decision in *Gutierrez* implies that a person now *can* consent to sex with a person known to be "HIV positive," as long as the risk of transmission is not "likely," because sexual contact by someone with HIV is no longer treated as an aggravated assault *per se*. *See* United States v. Gutierrez, No. 13-0522/AF, slip op. at 6–17 (C.A.A.F. Feb. 23, 2015).

[6] Initial charges also included forcible sodomy, in violation of Article 125, 10 U.S.C. § 925, under the same rationale that the victim could not consent to either oral or anal sex (even *insertive* anal sex where the victim was penetrating). The prosecutor dismissed that charge at the end of the first Article 32 pretrial investigation.

The cases which established the military's HIV-specific legal standards relied on a chain of basic inferences and presumptions which have never been comprehensively tested and proven.[7] With charges derived from the dubious results[8] of limited laboratory tests,[9] service members face serious felony-level charges[10] and substantial deprivation of liberty upon conviction.[11] As case law surrounding HIV issues developed, the most fundamental facts regarding HIV and its nexus to AIDS were repeatedly conceded and accepted without being questioned or proven through reliable scientific procedures.[12] Each case relies on three fundamental assumptions: that a lab test for antibodies is conclusive proof that the accused is infected with HIV,[13] that HIV is

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[7] *See* Peter H. Duesberg, *Human Immunodeficiency Virus and Acquired Immunodeficiency Syndrome: Correlation but not Causation*, 86 PROC. NATL. ACAD. SCI. USA, 755, 755–64 (1989), *available at* http://www.pnas.org/content/86/3/755.full.pdf+html (explaining the logical assumptions and examining the evidence for them). *See, e.g.*, *Gutierrez*, No. 13-0522/AF, slip op. at 9 (noting the questions in the case do not include "whether HIV . . . is likely to inflict grievous bodily harm" or whether the accused is "validly diagnosed with HIV").

[8] *See* Eleni Papadopulos-Eleopulos et. al., *Is a Positive Western Blot Proof of HIV Infection?*, 11 NATURE BIOTECH. 696 (1993), *available at* http://www.nature.com/nbt/journal/v11/n6/abs/nbt0693-696.html (explaining the non-specific nature of a Western Blot test); *ELISA/Western blot tests for HIV*, MEDLINE PLUS, http://www.nlm.nih.gov/medlineplus/ency/article/003538.htm (last updated 5/19/2013) ("The Western Blot can also be unclear, in which case more testing is done.").

[9] *See* U.S. DEP'T OF DEF., INSTR. 6485.01, HUMAN IMMUNODEFICIENCY VIRUS (HIV) IN MILITARY SERVICE MEMBERS glossary, part II (7 Jun. 2013) [hereinafter DoDI 6485.01] (identifying "laboratory evidence of HIV infection" as the standard for considering servicemembers HIV positive and defining this as "[a] reactive and confirmed serologic result, and/or reactive or quantitative nucleic acid result for HIV infection according to a Food and Drug Administration-approved test.")

[10] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 14e, 16e, 51e, and 54e (2012) [hereinafter MCM].

[11] *See, e.g.*, United States v. Bygrave, 46 M.J. 491 (C.A.A.F. 1997) (affirming sentence of BCD, 4 yrs conf, total forf, red E1); United States v. Schoolfield, 40 M.J. 132 (C.M.A. 1994) (affirming sentence of DD, 15 yrs conf, total forf, red E1); United States v. Johnson, 30 M.J. 53 (C.M.A. 1990) (affirming sentence of DD, 10 yrs conf, total forf, red E1); United States v. Stewart, 29 M.J. 92 (C.M.A. 1989) (affirming sentence of DD, conf & $250/mo forf for 40 mos, red E1, where CMR reduced conf to 2 yrs to comply with terms of PTA).

[12] *See* United States v. Weatherspoon, 49 M.J. 209, 211 (C.A.A.F. 1998) ("The second prong of the likelihood analysis, consideration of the magnitude of the risk, was not at issue in the HIV cases. In those cases, it was uncontested that death was the natural and probable consequence if the virus was transmitted and the victim developed AIDS.") (citing United States v. Klauck, 47 M.J. 24, 25 (C.A.A.F. 1997); United States v. Joseph, 37 M.J. 392, 396 (C.M.A. 1993); *Johnson*, 30 M.J. at 55, 56).

[13] *See, e.g.*, *Bygrave*, 46 M.J. at 492 (stating the accused "tested positive for HIV" and subsequently received treatment and counseling).

transmissible and infectious to some degree,[14] and that HIV is the necessary and sufficient cause[15] of a fatal disease called AIDS.[16]

The problem is that there is no reliable proof that an individual with certain antibodies is actually infected with the HIV retrovirus, that he can (or did) transmit the virus to another, or that HIV causes AIDS.[17] Over the years, several notable scientists have dared to dissent from the widely-held view that HIV causes AIDS.[18] Yet to this day, few Americans know there is, or ever has been, *any* doubt or controversy about HIV as the explanation for AIDS. Thus, when the military began restricting and punishing the activities of HIV-positive servicemembers nearly 30 years ago to prevent the spread of an apparently deadly virus,[19] the idea that an HIV positive laboratory test is proof of a highly contagious sexually transmitted disease that will eventually lead to AIDS and death almost instantly crystallized into fundamental truth.[20] The unchallenged utterances about HIV and AIDS by a few military doctors and nurses redefined the law as courts gave expansive effect to "safe sex" orders and created a new, unique, all-encompassing standard

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[14] *See, e.g.*, United States v. Gutierrez, No. 13-0522/AF, slip op. at 9–16 (C.A.A.F. Feb. 23, 2015).

[15] *See, e.g.*, *Johnson*, 30 M.J. at 57 ("[T]he evidence shows that, in this era of heightened awareness and concern regarding the dangers of transmitting HIV, both the military and civilian communities recognize that, under many circumstances, AIDS is 'the natural and probable consequence' of exposure to HIV."); Stewart 29 M.J. at 93 (summarizing aggravation witness' testimony regarding the frequency of HIV becoming AIDS: initially it was believed to be 10 percent, in 1987 it was between 30 and 50 percent, and researchers then believed that soon "it could be 90 percent or more that will actually develop AIDS").

[16] *See Joseph*, 37 M.J. at 396.

[17] *See* Patricia Goodson, *Questioning the HIV-AIDS hypothesis: 30 years of dissent*, FRONTIERS IN PUB. HEALTH 1 (2014), *available at* http://journal.frontiersin.org/Journal/10.3389/fpubh.2014.00154/full (providing a recent summary of the logical flaws, conflicting evidence, and scientific dissents relating to the HIV hypothesis for AIDS).

[18] Goodson, *supra* note 17 at 1.

[19] *See* Captain Melissa Wells-Petry, *Anatomy of an AIDS Case: Deadly Disease as an Aspect of Deadly Crime*, ARMY LAW., Jan. 1988, 17–20 (calling on military prosecutors to use their imagination and make the "living law" live a bit to give commanders more tools for combating the deadly "AIDS virus").

[20] *See, e.g.*, United States v. Johnson, 30 M.J. 53, 57 (C.M.A. 1990) ("Evidence of record sufficiently demonstrates that appellant's semen containing HIV was certainly a means capable of transmitting a deadly disease, thus producing death or grievous bodily harm.").

to apply in HIV-related aggravated assault cases.[21] However, as our understanding of HIV and AIDS evolved, military courts had to reconcile the uniquely aggressive HIV-specific legal standards with mounting evidence that increasingly departed from our original understanding of everything relating to HIV and AIDS. As challenges in criminal cases increasingly expose the gaps in HIV orthodoxy, those with legal responsibilities in the military must critically and honestly examine hypotheses, technologies, factual presumptions, and legal standards which define how we handle crimes based on "evidence of HIV infection."[22]

No legal paper can presume to provide a comprehensive analysis of the many scientific issues relating to HIV and AIDS. This paper is no exception. However, to understand the factual and legal issues in an HIV case, the reader needs a basic understanding of relevant scientific principles and procedures. As a result, this paper distills a vast amount of sophisticated science into highly summarized paragraphs, sentences, and sometimes even a mere footnote. Even if this paper remained confined to HIV/AIDS orthodoxy, which has produced more than 100,000 scientific papers,[23] it would only represent the tip of an enormous iceberg of data. Yet the point of this paper is to go *outside* the HIV orthodoxy to put the complex issues of HIV and AIDS in their true conflicted context as it relates to the military's application of the law to HIV.

First, the scientific background section gives a brief summary of the history and development of the science of HIV and AIDS to illustrate the fundamental problems with the HIV hypothesis, the logical force of competing AIDS hypotheses, and the limitations of HIV testing and efforts to establish AIDS causation. Second, the legal background section shows how military HIV-related

[21] United States v. Gutierrez, No. 13-0522/AF, slip op. at 10–11 (C.A.A.F. Feb. 23, 2015). *See* discussion *infra* Parts II.B.2a., II.B.2.b.

[22] DoDI 6485.01 (using this term of art for classification as infected with HIV).

[23] PETER H. DUESBERG, INVENTING THE AIDS VIRUS 173 (1996).

case law developed in a vacuum, focused only and unquestioningly on HIV as the cause of AIDS. Third, the analysis section synthesizes the factual and legal issues relating to HIV and discusses current and potential challenges to the traditional presumptions regarding HIV and AIDS. Finally, the conclusion presents practical considerations to guide practitioners as they recognize and work to correct factual and legal errors regarding HIV that have become deeply ingrained in military law and policy.

II. Development

A. The Unproven Hypothesis of HIV as the Infectious Cause of AIDS

Unlike more objectively verified contagious diseases that sometimes form the basis of criminal punishment,[24] HIV is unique in several significant ways which affected its legal development and continue to influence its current standing in the military criminal justice system. First, HIV was declared to be the cause of AIDS through political machinations and popular media, rather than the scientific process.[25] Second, there is significant doubt about the ability of HIV to cause AIDS.[26] Third, other hypotheses provide more consistent, comprehensive, and notably non-contagious explanations for the classification of diseases that characterize AIDS.[27] Fourth, the flaws in the HIV hypothesis create several practical problems for the tests used to determine whether people are infected with HIV.[28]

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[24] *See, e.g.*, United States v. Joseph, 37 M.J. 392, 396 (C.M.A. 1993) (declaring criminal liability for servicemembers who expose others to "HIV, Polio, Hepatitis B, or certain venereal diseases") (all caps removed).

[25] *See* discussion *infra* Part II.A.1; DUESBERG, *supra* note 23, at 145–68.

[26] *See* discussion *infra* Part II.A.2; Goodson, *supra* note 17, at 1–9 (describing the doubts, 30 years after the claim that HIV causes AIDS).

[27] *See* discussion *infra* Part II.A.3.

[28] *See* discussion *infra* Part II.A.4.

1. Development of HIV as the Cause of AIDS

Human Immunodeficiency Virus became recognized as the cause of AIDS through political machinations and popular media declaration, not scientific proof, peer review, and replication of successful experimental results.[29] Ambitious scientists, pharmaceutical companies, gay rights activists, and government bureaucracies focused on infectious disease had powerful motives to establish an infectious, viral cause of AIDS.[30] As a result of its abnormal conception and delivery, HIV ironically started its life with little scientific legitimacy, but great political and public recognition and concern that has continued, largely unchanged, through its thirty year existence.[31] This section describes the discovery and identification of AIDS, the search for a cause, and the process through which HIV was determined to be that cause.

From 1981 through 1984, an unusual pattern of relatively rare diseases began being noticed and monitored by doctors treating homosexual men in urban centers such as New York and Los Angeles.[32] The uncommon diseases that repeatedly appeared in these patients included Kaposi's

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[29] *See* Goodson, *supra* note 17, at 1; DUESBERG, *supra* note 23, at 131–68.

[30] *See* DUESBERG, *supra* note 23, at 145–59.

[31] *See* Goodson, *supra* note 17, at 1–2.

[32] Dr. Michael Gottlieb, the "ambitious young man" who was treating some of the first gay male patients with similar sets of unusual symptoms, received and acted on advice to quickly submit his findings to the CDC Morbidity and Mortality Weekly Report to "alert[] public health officials" and "stake [his] claim . . . as [the new disease's] 'discoverer.'" Elizabeth Fee & Theodore M. Brown, *Michael S. Gottlieb and the Identification of AIDS*, 96 AM. J. PUB. HEALTH, 982, 982–83 (2006), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1470620/. Several months later, shortly after "Alvin Friedman-Kien published a description of twenty-six cases of Kaposi's sarcoma in gay men in New York and California," Dr. Gottlieb published his description of this "potentially transmissible immune deficiency" along with his hypothesis that "a new strain of CMV [Cytomegalovirus] had emerged in the homosexual population and was causing immune deficiency." *Id. See* Michael S. Gottlieb, *Pneumocystis carinii pneumonia and mucosal candidiasis in previously healthy homosexual men: Evidence of a new acquired cellular immunodeficiency*, 305 N. ENGL. J. MED. 1425–31 (1981), *available at* http://www.nejm.org/doi/full/10.1056/NEJM198112103052401. Gottlieb and his co-authors "acknowledged the possibility that CMV was a result rather than a cause of the T-cell deficiency and that some other undetected microorganism, drug, or toxin might be making these patients susceptible to opportunistic organisms, including CMV." Fee & Brown, *supra*, at 983.

sarcoma and *Pneumocystis carinii* pneumonia.[33] These formed the core of what became a gradually expanding[34] set of diseases defining AIDS.[35]

HIV was prematurely assumed as the cause of AIDS as "the result of a rush to judgment in 1984 when virologist Robert Gallo from the National Institutes of Health, along with the Department of Health and Human Services, announced at an international press conference that [AIDS] was caused by a retrovirus, now known as [HIV]."[36] Though during the press conference HIV was declared to be the "probable cause" of AIDS,[37] not "even one American study on HIV had appeared in scientific literature."[38] Scientifically, Gallo's evidence for HIV at the time was little more than "antibodies against the virus in 'about 85 percent of patients with AIDS.'"[39] Moreover, Gallo committed a variety of "scientific misconduct"[40] to create his

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[33] *See* CELIA FARBER, SERIOUS ADVERSE EVENTS: AN UNCENSORED HISTORY OF AIDS 14 (2006).

[34] DUESBERG, *supra* note 23, at 210–11 (presenting the "Chronology of the CDC's AIDS definitions," showing that the definition started with only 12 diseases in 1983, then grew to 18 in 1985, 26 in 1987, and 31 in 1993). The CDC's most recent list of AIDS-defining diseases shows that there has been little change since 1993. CENTERS FOR DISEASE CONTROL AND PREVENTION, MORBIDITY AND MORTALITY WKLY. REP. (MMWR) 63(RR03), 1–10, REVISED SURVEILLANCE CASE DEFINITION FOR HIV INFECTION, UNITED STATES—2014 (11 Apr. 2014), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/rr6303a1.htm?s_cid=rr6303a1_e.

[35] AIDS is defined in a variety of ways around the world. *See Weekly Epidemiological Record*, WHO 275 (16 Sept. 1994), *available at* http://www.who.int/hiv/strategic/en/wer_94_69_273.pdf?ua=1; *Overview of AIDS Case Definitions Used in Countries*, WHO (1997), http://www.who.int/entity/hiv/strategic/en/use_aids_def.xls?ua=1.

[36] Peter H. Duesberg, *Results Fall Short for HIV Theory*, INSIGHT, Feb. 14, 1991, *available at* http://www.duesberg.com/papers/pdinsight.html.

[37] Geoffrey Cowley, *The day they discovered the AIDS virus*, MSNBC, Apr. 23, 2014, http://www.msnbc.com/msnbc/the-day-they-discovered-the-aids-virus (quoting Margaret Heckler, President Reagan's Health and Human Services Secretary) ("First, the probable cause of AIDS has been found: a variant of a known human cancer virus. Second, not only has the agent been identified, but a new process has been developed to mass produce this virus. Thirdly, with the discovery of both the virus and this new process, we now have a blood test for AIDS. With a blood test, we can identify AIDS victims with essentially 100% certainty.").

[38] Duesberg, *supra* note 36.

[39] Duesberg, *supra* note 36. Specifically, "scientists identified antibodies to a retrovirus known as LAV, or HTLV-III, in 48 persons (from a sample of 119, with and without immune deficiency symptoms.)" Goodson, *supra* note 17, at 1.

[40] *See* Robert C. Gallo, M.D., Board Docket No. A-93-91 (Dep't of Health and Human Services Office of Research Integrity Offer of Proof 1993) (demonstrating, inter alia, that Gallo's lead paper proposing the HTLV-III (HIV)

breakthrough on HIV[41] in a series of papers[42] that he hastily published without peer review.[43] Politically, however, the announcement "was welcomed by the Reagan administration as a quick answer to gay pressures for a solution to the growing AIDS epidemic."[44] With the cause of AIDS identified, "scientists' attention and government resources could . . . focus on treatment, cure, and vaccine development."[45] And focus they did, with extraordinary levels of attention and financial resources.[46]

2. A Flawed and Untested Hypothesis for the Cause of AIDS

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hypothesis for AIDS was "fraught with false and erroneous statements" and that his "actions reflect [a] propensity to misrepresent and mislead in favor of his own research findings or hypotheses"), *available at* http://sciencefictions.net/pdfdocs/ori_op_part1.pdf, http://sciencefictions.net/pdfdocs/ori_op_part2.pdf, http://sciencefictions.net/pdfdocs/ori_op_part3.pdf, and http://sciencefictions.net/pdfdocs/ori_op_part4.pdf. *See also* Philip J. Hilts, *Federal Inquiry Finds Misconduct By a Discoverer of the AIDS Virus*, N.Y. TIMES, Dec. 31, 1992, http://www.nytimes.com/1992/12/31/us/federal-inquiry-finds-misconduct-by-a-discoverer-of-the-aids-virus.html.

[41] Gallo referred to this virus as Human T-lymphotropic virus ("HTLV-III") and tried to keep that name for more than a year after the Int'l Comm. on the Taxonomy of Viruses created the name "Human Immunodeficiency Virus." John Crewdson, *As the Cooks Squabbled, The Alphabet Soup Boiled Down to Hiv* [sic], CHI. TRIB., Nov. 19, 1989, *available at* http://articles.chicagotribune.com/1989-11-19/health/8903130802_1_htlv-leukemia-virus-aids-virus.

[42] *See* M. Popovic et al., *Detection, Isolation, and Continuous Production of Cytopathic Retroviruses (HTLV-III) from Patients with AIDS and Pre-AIDS*, 224 SCI. 497 (1984); M. G. Sarngadharan et al., *Antibodies Reactive with Human T-Lymphotropic Retroviruses (HTLV-III) in the Serum of Patients with AIDS*, 224 SCI. 506 (1984); Robert Gallo et al., *Frequent Detection and Isolation of Cytopathic Retroviruses (HTLV-III) from Patients with AIDS and at Risk for AIDS*, 224 SCI. 500 (1984); J. Schüpbach et al., *Serological Analysis of a Subgroup of Human T-LymphotropicRetroviruses (HTLV-III) Associated with AIDS*, 224 SCI. 503 (1984).

[43] DUESBERG, *supra* note 23, at 157–58.

[44] Duesberg, *supra* note 36.

[45] Goodson, *supra* note 17, at 1.

[46] *See, e.g.*, *How We're Spending*, AIDS.GOV, https://www.aids.gov/federal-resources/funding-opportunities/how-were-spending/ (last revised 5 Jul. 2013) (showing an increase in U.S. federal funding for domestic HIV/AIDS purposes from $20.5 billion to $23.2 billion between FY 2011 and FY 2014); Memorandum from Under Sec'y of Def. (Personnel and Readiness) to Office of Nat'l AIDS Policy (8 Feb. 2011), *available at* https://www.aids.gov/federal-resources/national-hiv-aids-strategy/nhas-operational-plan-dod.pdf (outlining DoD's operational plan for implementing the President's "National HIV/AIDS Strategy for the United States" with the background that, "[s]ince the establishment of the Department of Defense HIV/AIDS Prevention Program in 2001 and the President's Emergency Plan for AIDS Relief (PEPFAR) in 2003, the DoD has had a critical role in *the single largest international health initiative dedicated to a single disease in U.S. Government history*.") (emphasis added).

Despite the resources devoted to HIV for three decades, the untested and unproven hypothesis that it is the cause of AIDS contains technical, virological, and epidemiological inconsistencies, among many others.[47] Throughout the early years of HIV and AIDS, these inconsistencies compelled creative changes to the definitions of HIV and AIDS. In spite of these inconsistencies, HIV's rapid and early selection as the infectious cause of AIDS subsequently restricted the general interest in recognizing criticisms of the hypothesis or exploring other potential explanations for AIDS.

First, the HIV hypothesis of AIDS is technically inconsistent because HIV does not exhibit the characteristics of an infectious agent. To identify "[t]he causative agent of an infectious disease," scientists apply Koch's Postulates.[48] The first postulate requires that "[t]he microbe must be found in all cases of the disease."[49] The second requires that "[t]he microbe must be isolated from the host and grown in pure culture."[50] The third is that [t]he microbe must reproduce the original disease when introduced into a susceptible host."[51] However, despite a variety of attempts,[52] scientists have never convincingly proven HIV to meet any of Koch's Postulates, let alone all three.[53]

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[47] Duesberg, *supra* note 7, at 760 ("HIV is not sufficient to cause AIDS because HIV meets neither Koch's postulates nor established epidemiological, biochemical, genetic, and evolutionary criteria of a viral pathogen. . . . HIV may not even be necessary for AIDS because there is neither biochemical nor genetic evidence that it initiates or maintains AIDS.").

[48] Duesberg, *supra* note 7, at 756.

[49] DUESBERG, *supra* note 23, at 178. *See* Duesberg, *supra* note 7, at 756 ("'[T]he parasite must be present in every single case of the disease, under conditions that can account for the pathological lesions and the clinical course of the disease.' However, there is no free virus in most—and very little in some—persons with AIDS, or in asymptomatic carriers. . . . Antibody to HIV is confirmed in only about 40% of the U.S. cases and in only 7% of the AIDS cases from New York and San Francisco, which represent one-third of all U.S. cases.").

[50] DUESBERG, *supra* note 23, at 178.

[51] DUESBERG, *supra* note 23, at 180.

[52] Attempts include efforts by "a high ranking NIH geneticist . . . Dr. Stephen O'Brien" to pressure Dr. Peter Duesberg to sign off as one of three scientists (including O'Brien and Gallo) on a draft of *HIV Causes AIDS:*

Second, HIV's dual personality is inconsistent with principles of virology. Though HIV is a retrovirus, a type of virus that by definition does not kill the host cell, it supposedly acts as a cell-killing "viral pathogen" to cause AIDS.[54] "Rather than killing cells shortly after infection and then departing," like normal viruses, retroviruses "become part of the DNA of each cell."[55] Retroviruses depend upon the continued survival of their host cells, yet HIV is believed to cause AIDS by killing T-cells.[56] Viruses cause disease shortly after infection, yet, "though HIV replicates within 1 to 2 days and induces immunity within 1 to 2 months," it is believed to cause AIDS only "after long and unpredictable asymptomatic intervals averaging 8 years."[57]

Third, the proponents of HIV provided creative justifications for its epidemiological inconsistency over the years. For example, proponents offered decreasing likelihoods of transmission and increasing latency periods between initial HIV infection and development into

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Koch's Postulates Fulfilled. FARBER, *supra* note 33, at 53. Duesberg returned the original paper after removing his name and providing a separate rebuttal. *Id*. Dr. O'Brien later published the paper with James Goedert as a "Guest Editorial." Stephen J. O'Brien & James J. Goedert, *HIV Causes AIDS: Koch's Postulates Fulfilled*, 8 CURRENT OPINION IN IMMUNOLOGY, 613–18 (1996). The National Institute for Health's website all but concedes the fraudulent nature of the HIV proponents' claims that the postulates are fulfilled by providing a single sentence as evidence of the first postulate and by saying "virtually all" instead of "all": "With regard to postulate #1, numerous studies from around the world show that virtually all AIDS patients are HIV-seropositive; that is they carry antibodies that indicate HIV infection." *The Evidence that HIV Causes AIDS*, NATIONAL INSTITUTE FOR HEALTH, http://www.niaid.nih.gov/topics/HIVAIDS/Understanding/howHIVCausesAIDS/Pages/HIVcausesAIDS.aspx (last updated Jan. 14, 2010).

[53] Duesberg, *supra* note 7, at 756–57 (explaining why and how HIV fails to meet each of Koch's postulates). *See also* DUESBERG, *supra* note 23, at 175–88 (providing additional explanation).

[54] *See* Duesberg, *supra* note 7, at 759–60.

[55] DUESBERG, *supra* note 23, at 117.

[56] Duesberg, *supra* note 7, at 755. *Compare What is HIV/AIDS*, AIDS.GOV, https://www.aids.gov/hiv-aids-basics/hiv-aids-101/what-is-hiv-aids/ (last updated 04/29/2014) ("HIV can hide for long periods of time in the cells of your body and . . . attacks a key part of your immune system—your T-cells or CD4 cells. . . . Over time, HIV can destroy so many of your CD4 cells that your body can't fight infections and diseases anymore."), *with* Duesberg, *supra*, at 755 (explaining that "retrovirus[es]" do not behave like "cytocidal virus[es]" and showing that HIV is no exception).

[57] Duesberg, *supra* note 7, at 755.

AIDS.[58] This permits foundational assertions about HIV to persist, even when directly contradicted by growing evidence.[59] The large number of counterintuitive and continually changing assumptions in the HIV hypothesis naturally leads critical observers to question whether there is a simpler explanation for AIDS that is more logically coherent and consistent.[60]

However, rather than undermine the mainstream legitimacy of the HIV hypothesis, the confusion created by HIV's inconsistencies generated creative definitions and exclusions for both HIV and AIDS.[61] First, the HIV/AIDS hypothesis is "biased by the practice of excluding from AIDS statistics those patients with AIDS-defining diseases in whom no trace of HIV can be found."[62] As "many reports . . . accumulated of clinically diagnosed AIDS patients who were HIV-negative . . . [the] cases were shunted aside . . . through the invention of a brand-new disease, 'idiopathic CD4-T-cell lymphopenia (ICL).'"[63] This "pathogenic immune deficiency of unknown cause . . . is precisely the same as the definition of AIDS during the several years

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[58] *See* DUESBERG, *supra* note 23, at 74–76, 96–103 (describing the concept of slow viruses or "lentiviruses" developed to explain HIV's behavior).

[59] For example, the HIV proponents continue to claim that the immune system cannot develop immunity to HIV, which it can and does. *Compare What is HIV/AIDS*, AIDS.GOV, https://www.aids.gov/hiv-aids-basics/hiv-aids-101/what-is-hiv-aids/ (last updated 04/29/2014) ("[O]ver time, your immune system can clear most viruses out of your body. That isn't the case with HIV – the human immune system can't seem to get rid of it. That means that once you have HIV, you have it for life."), *with* Duesberg, *supra* note 7, at 758 ("The claims of some scientists that antiviral antibodies fail to neutralize HIV . . . are incompatible with the efficient immunity in vivo and with experimental evidence for virus-neutralizing activity in vitro.").

[60] "Most philosophers believe that, other things being equal, simpler theories are better." Alan Baker, *Simplicity*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2013), http://plato.stanford.edu/archives/fall2013/entries/simplicity/. This principle of simplicity, economy, or parsimony is commonly referred to as Occam's Razor and expressed as some variation of, "Don't multiply postulations beyond necessity." *Id*. Some scientists have proposed simpler potential explanations for AIDS. *See* discussion *infra* at Part II.A.3.

[61] Duesberg, *supra* note 36.

[62] Duesberg, *supra* note 36.

[63] Henry H. Bauer, *Questioning HIV/AIDS: Morally Reprehensible or Scientifically Warranted?*, 12 J. AM. PHYS. SURG., 116, 117 (2007), *available at* http://www.jpands.org/vol12no4/bauer.pdf.

before the claimed discovery of HIV."[64] Second, the new HIV "hypothesis proposed that HIV would cause 30 previously known diseases, including a number of diseases that are not consequences of immunodeficiency, such as cancer, weight loss and dementia."[65] However, because HIV itself became "the only link that holds together the 30 heterogeneous AIDS diseases," it became logically impossible to falsify the link between HIV and AIDS.[66] Moreover, though the HIV hypothesis attributes its ability to cause AIDS to immune deficiency, not all AIDS-defining conditions are infectious or explained by immune deficiency.[67]

The technical, virological, and epidemiological inconsistencies noted above—among many others—arose after HIV had already assumed power as the etiological agent of AIDS. Yet basic logic compels the most critical analysis of the most unusual and complex hypotheses.[68] In the process of trying to understand HIV and the true nature of AIDS, scientists identified several critical weaknesses of the HIV hypothesis and proposed "alternative hypotheses" for the cause of AIDS.[69]

3. Other Hypotheses for the Causes of AIDS

Despite three decades of scientific research surrounding HIV and AIDS, there is no scientific evidence that establishes that HIV causes AIDS.[70] As a result, "[m]any of the original

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[64] *Id.*

[65] Duesberg, *supra* note 36.

[66] Duesberg, *supra* note 36 ("AIDS is defined as a syndrome that occurs only in the presence of HIV. For example, if tuberculosis occurs in the presence of antibodies to HIV, it is AIDS. In the absence of those antibodies, it is tuberculosis.").

[67] *See* Duesberg, *supra* note 7, at 761.

[68] *See* DUESBERG, *supra* note 23, at 3–10.

[69] Goodson, *supra* note 17, at 1.

[70] Kary B. Mullis, *Foreword* to DUESBERG, *supra* note 23, at xi–xiv. *See, e.g.*, Anthony S. Fauci, *The Human Immunodeficiency Virus: Infectivity and Mechanisms of Pathogenesis*, 239 SCI. 617, 617 (1988), *available at*

misgivings [about HIV] have survived, and others have been raised, in the past three decades."[71] Those criticism and questions spawned alternative theories. However, the dominance of HIV has, for thirty years, prevented any significant demand for reappraisal of the HIV hypothesis.

The lack of scientific evidence to show that HIV causes AIDS created significant dissent among leading scientists in relevant fields.[72] Dr. Peter Duesberg, a primary discoverer of retroviruses,[73] has shown the lack of scientific support for HIV for decades.[74] The Nobel Prize winning chemist Kary Mullis, who invented the Polymerase Chain Reaction (PCR) test for analyzing HIV, searched in vain for several years to find a single scientific reference to support the basic assertion that "HIV is the probable cause of AIDS"[75] before discovering that other distinguished scientists also questioned the hypothesis.[76] Additionally, Etienne de Harven, who "produced the first electron micrograph of a retrovirus,"[77] observed that "[a]ll the images of particles supposedly representing HIV and published in scientific as well as in lay publications derive from [electron microscopy ("EM")] studies of *cell cultures*. They never show HIV

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http://www.sciencemag.org/content/239/4840/617 (omitting any footnote or other citation for one critical sentence in an extensively documented paragraph about the Nature of HIV: "These viruses, including HIV in humans, cause a slowly progressive and inevitably fatal disease in their hosts.").

[71] Goodson, *supra* note 17, at 1. The specific challenges to the HIV-AIDS hypothesis can be generally grouped into four categories: "(1) retroviral molecular markers; (2) transmission electron microscopy (EM) images of retroviral particles; (3) efficacy of anti-retroviral (ARV) drugs; and (4) epidemiological data." *Id.* at 2.

[72] Goodson, *supra* note 17, at 1.

[73] DUESBERG, *supra* note 23, at 118–19.

[74] DUESBERG, *supra* note 23, at 388–406.

[75] Kary B. Mullis, *Foreword* to DUESBERG, *supra* note 23, at xi–xiv.

[76] *Id.*

[77] Goodson, *supra* note 17, at 4 (quoting REBECCA CULSHAW, SCIENCE SOLD OUT: DOES HIV REALLY CAUSE AIDS? 13 (2007).

particles coming directly from an AIDS patient."[78] These voices and others articulated many valid concerns about the HIV/AIDS hypothesis, but the HIV crowd drowned them out and ignored their ideas and cautions.

Each of the non-HIV hypotheses for the cause or causes of AIDS is based on "well-established causes of immune system malfunction."[79] Significantly, none of the other hypotheses involve transmission of an infectious agent.[80] The most prominent of these non-viral potential causes of AIDS are: "pharmacological (drug) factors,[81] immune disbalance factors,[82] latent infection overload,[83] and malnutrion.[84]"[85]

However, since HIV's anointment as the cause of AIDS, the scientists who question the hypothesis—though they "[know] a great deal about retroviruses and immunology"[86]—have

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[78] Goodson, *supra* note 17, at 4 (quoting Etienne de Harven, *Human Endogenous Retroviruses and AIDS Research: Confusion, Consensus, or Science?* 15 J. AM. PHYS. SURG. (2010) 69–74 (emphasis added)).

[79] Goodson, *supra* note 17, at 6–8.

[80] Goodson, *supra* note 17, at 7 ("For Duesberg and scientists agreeing with him, then, other agents would have to be responsible for the disastrous immune function collapse seen in AIDS patients.").

[81] Including illicit drugs such as amyl nitrates ("poppers"), prescribed drugs such as those given to transplant patients, and anti-retroviral drugs themselves, which are used to treat HIV infection/disease. Goodson, *supra* note 17, at 7. *See* Peter H. Duesberg, *Retroviruses as carcinogens and pathogens: expectations and reality*, 47 J. CAN. RES. (1987) 1199–1220, *available at* http://cancerres.aacrjournals.org/content/47/5/1199.full.pdf+html; Duesberg, *supra* note 7, at 755–64.

[82] Also known as the iNOS hypothesis, which shows that nitric oxide (NO), which, although "'involved in the regulation of diverse physiological and pathophysiological mechanisms in cardiovascular, nervous, and immunological systems,' . . . can also become a harmful 'cytotoxic agent in pathological processes, particularly in inflammatory disorders.'" Goodson, *supra* note 17, at 7 (quoting Fugen Aktan, *iNOS-mediated nitric oxide production and its regulation*, 75 LIFE SCI. 639 (2004)).

[83] Kary Mullis, *A hypothetical disease of the immune system that may bear some relation to the acquired immune deficiency syndrome*, 95 GENETICA 195, 196 (1995), *available at* http://link.springer.com/article/10.1007%2FBF01435010.

[84] Roberto Giraldo, *"Co-factors" Cause AIDS*, ROBERTO A. GIRALDO, *available at* http://www.robertogiraldo.com/eng/papers/CoFactorsCauseAIDS.html.

[85] Goodson, *supra* note 17, at 6.

[86] Goodson, *supra* note 17, at 1. *See also id.* at 8 ("That the scientific establishment world-wide insistently refuses to re-examine the HIV-AIDS hypothesis . . . is more difficult to accept, especially when one examines the

been minimized while their ideas, questions, and criticisms have been ignored by the scientific community.[87] The scientific press has published some of their papers, but rejected several of the more controversial ones.[88] Peer reviewers naturally function as "HIV protagonist[s]" because they are "sensitive to the commercial realities of publishing."[89] But the scientific refusal to re-examine the HIV hypothesis also involves "the complex, synergistic dynamics within the scientific, medical, economic, and political systems or ideologies worldwide"[90] that go well beyond the inherent viewpoint biases of peer review. This network of forces reinforcing the HIV hypothesis necessarily includes the laws that have been developed to address the threat of HIV/AIDS and the beliefs and biases of the lawyers and judges who implement them.

Until the scientific community honestly acknowledges this controversy and re-evaluates AIDS and its potential causes, the epistemic gap regarding what causes AIDS will persist and other hypotheses will remain untested.[91] In the meantime, continued application of the HIV

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credentials of those proposing such a revision. Their expertise carries as much weight as the teams who defend the orthodox hypothesis . . . . [T]aking into account the credibility of the scholars who question the HIV-AIDS hypothesis is, perhaps, the strongest argument *in favor* of seriously considering their critiques . . . .").

[87] *See* Goodson, *supra* note 17, at 1.

[88] *Compare Papers and Letters Published in Scientific Journals*, THE PERTH GROUP, http://www.theperthgroup.com/paperspublished.html (last visited Mar. 11, 2015), *with Papers and Letter Rejected by Editors of Scientific Journals*, THE PERTH GROUP, http://www.theperthgroup.com/rejected.html (last visited Mar. 11, 2015).

[89] *Commentary on The Emperor's New Virus?*, THE PERTH GROUP 2 (Sep. 20, 2011), http://www.theperthgroup.com/OTHER/ENVCommentary.pdf. *See also* Georg Steinhauser et al., *Peer review versus editorial review and their role in innovative science*, 33 THEORETICAL MED. BIOETHICS 359, 360 (2012) ("[T]he process of peer review can be prone to bias towards ideas that affirm the prior convictions of reviewers and against innovation and radical new ideas.").

[90] Goodson, *supra* note 17, at 9.

[91] *See, e.g.*, Goodson, *supra* note 17, at 9 (proposing that the public health work force should learn about HIV/AIDS history, conduct its own research to test AIDS hypotheses, and engage in broad debate with HIV-related stakeholders).

hypothesis remains both "a matter of life-and-death" and "of justice."[92] The validity of the HIV hypothesis matters to military legal practitioners because it determines the law's treatment of people with HIV—who may not have HIV at all.

4. Practical Problems with Identifying HIV Infection in a Servicemember

The logical and factual problems with the HIV hypothesis directly limit the extent to which HIV can be confirmed as infecting a person's body. Quite simply, HIV tests do not identify HIV; rather, they identify antibody proteins believed to be associated with HIV.[93] To make fair and informed decisions in HIV cases, military commanders and judge advocates need to understand the limitations of the specific tests used, the inductive nature of HIV testing methodology, and the gap that remains between HIV lab results and an affirmative HIV diagnosis.

First, the military uses a multi-step HIV testing methodology that produces a result of presumptive HIV infection without identifying an actual virus.[94] Though there are many different types of HIV laboratory tests,[95] the military's contractor[96] for HIV antibody testing

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[92] Goodson, *supra* note 17, at 9.

[93] Henry H. Bauer, *HIV Tests Are Not HIV Tests*, 15 J. AM. PHYS. SURG. 5, 5–9 (2010), *available at* http://www.jpands.org/vol15no1/bauer.pdf.

[94] Goodson, *supra* note 17, at 2 (describing "the 'evolution' of CDC's stances regarding the role of antibodies, infection, and HIV tests," first recognizing that "*[w]hether the person is currently infected or immune is not known*, based on the serologic test alone" in 1984, then moving in 1986 to "patients with repeatedly reactive screening tests for HTLV-III/LAV antibody . . . in whom antibody is also identified by the use of supplemental tests (e.g., WB, immunoflurorescence assay) *should be considered both infected and infective*," and finally "adopt[ing] a non-qualified claim that antibodies signify active infection and/or illness: '*The presence of antibody indicates current infection*, though many infected persons may have minimal or no clinical evidence of disease for years.'") (emphasis added) (internal citations to CDC documents omitted).

[95] *See, e.g.*, *Advantages and disadvantages of FDA-approved HIV immunoassays used for screening by generation and platform*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Dec. 2014), http://www.cdc.gov/hiv/pdf/testing_AdvDisadvHIVtesting.pdf.

[96] *See, e.g.*, U.S. DEP'T OF NAVY BUREAU OF MED. AND SURG., NOTICE 6220, ROSTER FOR SUBMITTING BLOOD SAMPLES FOR HUMAN IMMUNODEFICIENCY VIRUS (HIV) TESTING 1 (9 Feb. 1993) [hereinafter BUMEDNOTE 6220]

performs an initial screen using the enzyme-linked immunosorbent assay ("ELISA" or "EIA") test.[97] After a sample screens positive for antibodies to HIV on one or more ELISA tests, it will be confirmed by one or more[98] Western Blot ("WB") tests.[99] The following summary explains how the tests work:

> In the ELISA, the "HIV proteins" are present as a mixture. For the WB, the HIV proteins are dissociated and placed on a polyacrylamide gel slab. After electrophoresis, which separates the proteins by molecular weight and charge, the proteins are transferred to a nitrocellulose membrane by electroblotting. In performing the antibody test, in both ELISA and WB, the patient's serum is added to the antigen preparation. It is assumed that if HIV antibodies are present, they will react with the HIV proteins which, after washing, are visualised by an enzyme anti−human-immunoglobulin chromogen reaction. In the ELISA the reaction is read optically. For the WB, individual proteins are recognised and interpreted visually as coloured bands, each of which is designated with a small "p" (for protein), followed by a number, (which is the molecular weight in kilodaltons),for example p41.[100]

If a servicemember's sample tests positive through the required number of ELISA and WB tests,[101] he will be sent to a specialized military treatment facility for clinical evaluation.[102]

("Blood samples for HIV antibody testing are submitted through designated Navy medical treatment facilities (MTFs) to a Navy contractor for full-service testing.").

[97] *See, e.g.*, U.S. DEP'T OF AIR FORCE, INST. 44-178, HUMAN IMMUNODEFICIENCY VIRUS PROGRAM, para A5.3 (4 Mar. 2014) [hereinafter AFI 44-178] ("Conduct the initial test using a FDA-approved screening test. Interpret results according to the manufacturer's package insert.").

[98] Service regulations vary with regard to confirmatory testing requirements. The Army requires two and possibly three confirmatory tests. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 600-110, IDENTIFICATION, SURVEILLANCE, AND ADMINISTRATION OF PERSONNEL INFECTED WITH HUMAN IMMUNODEFICIENCY VIRUS para. 3-3 b.1.(c) (22 Apr. 2014) [hereinafter AR 600-110].

[99] *See, e.g.*, AFI 44-178 para A5.3–A5.4; AR 600-110 3-3 b.1.(c) ("If the initial screen is HIV reactive, the specimen will be retested in duplicate to ensure accuracy.").

[100] Papadopulos-Eleopulos, *supra* note 8, at 696.

[101] The Army has a notable exception to this, where an individual can have one *negative* ELISA screen *and* one *negative* WB "confirmatory" test and *still be considered infected with HIV*. *See* AR 600-110, para. 3-3. If the first WB screens positive and a second screens negative, a third sample will be tested. *Id.* If the third WB is positive, the servicemember will be "medically evaluated for HIV infection." *Id.*

Second, HIV tests are inherently unreliable because they identify *antibodies* to HIV, not HIV itself.[103] Therefore, while the U.S. government presumes antibodies to indicate HIV infection, the lab tests used for identification of HIV infection cannot prove with any reliable degree of certainty that a person who screens positive is actually infected with a virus that will cause AIDS.[104] The presence of an *antibody* to a virus or a protein associated with a virus does not prove current, active infection with that virus; quite the contrary, "[a]ntiviral antibodies signal a successful *rejection* of the virus and a lasting protection (vaccination) against diseases by the same or related viruses."[105] "Paradoxically, HIV is said to cause AIDS, by definition, only years after inducing very active antiviral immunity."[106]

Additionally, antibody tests are likely to produce false-positive results because antibodies are particularly "promiscuous."[107] As early as 1996, more than 60 conditions known to cause false-positive results for HIV antibodies had been "published in reputable peer-reviewed journals . . ."[108] This list included "elements ubiquitous among all populations such as the flu, flu

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[102] *See* AR 600-110, para. 3-3; AFI 44-178 para A5.3–A5.4; U.S. DEP'T OF NAVY, INSTR. 5300.30E, MANAGEMENT OF HUMAN IMMUNODEFICIENCY VIRUS, HEPATITIS B VIRUS AND HEPATITIS C VIRUS INFECTION IN THE NAVY AND MARINE CORPS para. 5.a., 8.a. (13 Aug. 2012) [hereinafter SECNAVINST 5300.30E].

[103] *See* Bauer, *supra* note 93, at 5–9.

[104] *See Referenced Quotes about HIV/AIDS Tests and Measurements*, ALBERTA REAPPRAISING AIDS SOCIETY (6 Aug. 2014), http://aras.ab.ca/test-disclaimers.php (quoting and commenting upon the disclaimers provided with 36 HIV tests, which consistently state the test is not to be used as a diagnostic test to confirm the presence of HIV infection).

[105] Duesberg, *supra* note 7, at 758 (emphasis added).

[106] Duesberg, *supra* note 7, at 758 ("If this assertion were correct, HIV would be the first virus to cause a disease only after antiviral immunity.").

[107] *See* Valendar Turner, *Do HIV Antibody Tests Prove HIV Infection?*, VIRUSMYTH http://virusmyth.com/aids/hiv/vttests.htm (last visited 12 Mar. 2015) (text for a radio broadcast for the Australian Broadcasting Corporation) (explaining why antibodies engage in casual behavior).

[108] Goodson, *supra* note 17, at 2 (citing Christine Johnson, *Whose Antibodies Are They Anyway? Factors Known to Cause False Positive HIV Antibody Test Results*, CONTINUUM, Sept.–Oct. 1996, at 4–5, *available at* http://www.immunity.org.uk/wp-content/uploads/2013/06/v4n3.pdf).

vaccinations, pregnancy in women who have had more than one child, tetanus vaccination and malaria . . . ."[109] Indeed, the DoD's changing use and definition of the term "*laboratory evidence* of HIV infection" subtly indicates the lack of certainty in the process of connecting antibodies to actual viral infection.[110] HIV tests are unreliable because they test for antibodies, not a virus, and scores of other explanations exist for those antibodies.

Finally, because of the non-specific and inductive nature of the commonly used HIV testing methods, a large gap remains between the positive laboratory tests and an affirmative diagnosis of HIV infection. Both ELISA and WB tests are highly sensitive screening tools that require validation against a "gold standard"—HIV itself—before clinical medicine can confirm infection with HIV.[111] Though the WB suffers from a fundamental reliability to confirm its accuracy, most doctors still believe it is highly accurate.[112] As a result, the "reactive and confirmed

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[109] Goodson, *supra* note 17, at 2 (citing Johnson, *supra* note 108, at 4–5).

[110] *See, e.g.*, DoDI 6485.01 glossary, part II. Over time, the DoD has broadened the means that can be used to establish HIV infection. The 1991 definition was specific and narrow, the 2006 definition was more vague and less specific, and the 2013 definition is both more descriptive and inclusive, to include PCR and potentially other means of finding evidence of HIV. *Compare id.* ("A reactive and confirmed serologic result, and/or, reactive or quantitative nucleic acid result for HIV infection according to a Food and Drug Administration-approved test."), *with* U.S. DEP'T OF DEF., INSTR. 6485.01, HUMAN IMMUNODEFICIENCY VIRUS para. 3.4 (17 Oct. 2006) ("A reactive and confirmed result for HIV infection given by and according to a Food and Drug Administration-approved test."), *with* U.S. DEP'T OF DEF., DIR. 6485.1, HUMAN IMMUNODEFICIENCY VIRUS-1 (HIV-1) para. 3.3 (19 Mar. 1991) ("A reactive result given by a Food and Drug Administration (FDA)-approved enzyme-linked immunosorbent assay (ELISA) serologic test that is confirmed by a reactive and diagnostic immunoelectrophoresis test (Western blot (WB)) test on two separate samples."). *Cf.* U.S. DEP'T OF DEF., INSTR. 3020.41, OPERATIONAL CONTRACT SUPPORT (OCS) 33 (20 Dec. 2011) (outlining a more rigorous standard deploying contractors) ("HIV antibody positive *with the presence of progressive clinical illness or immunological deficiency*.") (emphasis added).

[111] *See* Papadopulos-Eleopulos, *supra* note 8, at 696–707.

[112] *Compare* Papadopulos-Eleopulos, *supra* note 8, at 696 ("[B]ecause no gold standard has been used to determine specificity, a positive WB may represent nothing more than cross-reactivity with non-HIV antibodies present in AIDS patients and those at risk. . . . [U]se of antibody tests as a diagnostic and epidemiological tool for HIV infection needs to be reappraised."), *with* Donald S. Burke et al., *Measurement of the False Positive Rate in a Screening Program for Human Immunodeficiency Virus Infections*, 319 N. ENGL. J. MED. 961 (1988), *available at* http://www.nejm.org/doi/full/10.1056/NEJM198810133191501 ("[A] screening program for HIV infection in a low-prevalence population can have an acceptably low false positive rate.").

serologic result" becomes the evidence for a servicemember's HIV infection.[113] That classification persists, even if subsequent tests cannot find any trace of the virus.[114]

Initial clinical assessments are not designed to validate the presumptions produced by the laboratory results. Though a servicemember undergoes an initial clinical assessment, the service regulations uniformly omit any requirement to perform a thorough, comprehensive assessment of the servicemember's entire medical record to identify causes of potential false positives.[115] Thereafter, illnesses or irregularities that develop are suspected as signs of HIV progression,[116] not indicators of any number of other conditions that could have caused a false-positive result on the initial antibody test. Moreover, subsequent clinical assessments and tests also do not confirm or deny the presumption of HIV infection. After a servicemember learns he is infected with HIV, he will occasionally have his "viral load" measured using a technology called polymerase chain reaction (PCR).[117] This is "regard[ed] as the most specific documentation of HIV's presence in a person's body."[118] Doctors tell their patients that a lower viral load means a lower chance of transmitting HIV, yet warn that even a person with an undetectable viral load can still

[113] DoDI 6485.01 glossary, part II (defining one of two ways to produce "laboratory evidence of HIV infection").

[114] *See, e.g.*, Dacus, 66 M.J. at 237.

[115] The Air Force's instruction provides the most detailed requirements for the clinical evaluation, but still does not require a full review of the servicemember's medical record and history. *See* AFI 44-178 para. A11.2.3. It states simply "SAMMC HIV Medical Evaluation Unit staff will conduct a confidential patient epidemiologic interview, repeat the contact notification process, and verify blood donation "lookback" process." *Id.* The epidemiological interview is concerned with contacts with others, not medical history. *See Id.* at A11.3.

[116] *See, e.g.*, AFI 44-178 para. A8.1.3. ("If the patient has persistent evidence of diminished intellectual skills, personality changes, and motor impairment, more specialized studies . . . may be required to evaluate the possible presence of a HIV-related mental or neurological syndrome.").

[117] Goodson, *supra* note 17, at 3.

[118] Goodson, *supra* note 17, at 3.

infect others with HIV.[119] DoD regulations refer to this PCR test as a "reactive or quantitative nucleic acid result for HIV infection."[120] Doctors commonly describe it as "measure of how much HIV virus is in the blood."[121] But this is misleading because the tests only identify proteins believed to be associated with HIV and may be confounded by "human endogenous retroviruses"—"retrovirus-like particles produced by host cells that are stressed or dying"—which are common in every human body.[122] As a result, Dr. Kary Mullis, who earned the Nobel Prize in 1993 for inventing the PCR test, "strongly opposed" its use as a quantitative measure of HIV.[123] Indeed, "many mainstream scientists and practitioners recommend caution when using PCR for screening or diagnosing infection"[124] because the depletion of CD-4 cells is not sufficiently "attributable to the direct effects of HIV replication."[125]

Despite this, military courts have accepted testimony about antibody and viral load test results as compelling proof of HIV infection,[126] regardless of the strength of the tests' findings

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[119] *See Viral Load*, AIDS.GOV, https://www.aids.gov/hiv-aids-basics/just-diagnosed-with-hiv-aids/understand-your-test-results/viral-load/ (last updated 3/12/2015). *See, e.g.*, Dacus, 235 M.J. at 237.

[120] DoDI 6485.01 glossary, part II (defining the second of two ways to produce "laboratory evidence of HIV infection.")

[121] Dacus, 66 M.J. at 237.

[122] Goodson, *supra* note 17, at 4.

[123] Goodson, *supra* note 17, at 3.

[124] Goodson, *supra* note 17, at 3.

[125] Benigno Rodríguez et al., *Predictive Value of Plasma HIV RNA Level on Rate of CD4 T-Cell Decline in Untreated HIV Infection*, 296 J. AM. MED. ASS'N. (JAMA) 1498, 1505 (2006), *available at* http://dx.doi.org/10.1001/jama.296.12.1498.

[126] *See, e.g.*, *Dacus*, 66 M.J. at 237 (asserting "Dacus is HIV-positive" based upon his "testing positive," notwithstanding medical officer's sentencing testimony that appellant's HIV was undetectable with current "viral load" technology); United States v. Klauck, 47 M.J. 24, 25 (C.A.A.F. 1997) ("Appellant had testified positive for the human immunodeficiency virus (HIV) some time prior to the date of these offenses."); United States v. Johnson, 30 M.J. 53, 54 (C.M.A. 1990) ("[A]ppellant learned that he had tested positive for HIV."); *Stewart*, 29 M.J. at 93 ("[A]ppellant admitted knowing that he had tested positive for Human Immunodeficiency Virus (HIV)."); United States v. Negron, 28 M.J. 775, 775 (A.C.M.R. 1989) ("[Appellant] was advised of a confirmed medical diagnosis

and even when an individual is completely asymptomatic.[127] Notwithstanding the insufficiency of the tests used to identify that a servicemember is infected with HIV, military regulations do not require clinical verification of the antibody tests; instead, they prospectively emphasize "[a]ggressive disease surveillance, health promotion and education programs for military personnel . . . to mitigate the impact of HIV."[128] As a result, servicemembers go through a host of highly invasive,[129] life-altering, and identity-defining actions without ever undergoing a thorough clinical examination to verify their supposed "diagnosis" of HIV infection.[130]

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that he carries the HIV antibody, a viral condition recognized as progenitor to the acquired immunodeficiency syndrome (AIDS) disease.").

[127] Physical symptoms relating to HIV or AIDS are not mentioned in any reported military appellate cases. The lack of symptoms has been indirectly mentioned in the context of low or undetectable "viral loads" in the appellant. *See, e.g.*, *Dacus*, 66 M.J. at 237 (summarizing doctor's findings that "[appellant's] viral load was so low that it was not detectable with existing technology" and his conclusion that "Dacus was one of those rare individuals whose immune system was able to shut down viral replication [of HIV] on its own"); *Johnson*, 30 M.J. at 55 (summarizing testimony from government's medical expert testifying about HIV and AIDS statistics, but making no mention of the medical history or symptoms of appellant).

[128] *See* SECNAVINST 5300.30E para. 3.e. *See* DoDI 6485.01 enclosure 3, para. 2.a (providing only that "[c]linical management of [a servicemember] with laboratory evidence of HIV infection will be conducted consistent with standard of care, evidence-based HIV clinical practice standards, and medical management guidelines, as described in DoDI 6025.13 and DoD 6025.13-R . . . ."). Those two references lay out broad quality assurance policies that never mention any specific procedure or standard relating to HIV. *See* DEP'T OF DEF., 6025.13-M, MEDICAL QUALITY ASSURANCE (MQA) AND CLINICAL QUALITY MANAGEMENT IN THE MILITARY HEALTH SYSTEM (MHS) (29 Oct. 2013) (reissuing DoD 6025.13-R as a DoD manual); DEP'T OF DEF., INSTR. 6025.13, MEDICAL QUALITY ASSURANCE (MQA) AND CLINICAL QUALITY MANAGEMENT IN THE MILITARY HEALTH SYSTEM (MHS) (17 Feb. 2011) (C1, 2 Oct. 2013).

[129] The invasiveness relates to the investigation done by medical personnel into the sexual partners, patterns, and history of a servicemember with HIV antibodies. *See, e.g.*, *Comprehensive Interview Record (CIR) Template*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/std/program/forms/cir-2013/cir-2013.pdf (last updated Dec. 29, 2014) (providing detailed questions for doctors to ask new HIV patients, with questions focusing on basic illegal drug-related risk factors and sexual history, but not on overall health history that would encompass illnesses, infections, prescriptions, and nutrition, among others considerations.).

[130] "Diagnosis" is "[t]he determination of a medical condition (such as a disease) by physical examination or by study of its symptoms." BLACK'S LAW DICTIONARY 518 (9th ed. 2009). It also includes "[t]he results of such an examination." *Id.* Diagnosis can be categorized as clinical, which is "[a] diagnosis from a study of symptoms only," or physical, which is "[a] diagnosis from physical examination only." *Id.* Some military courts have merged the relative certainty of "diagnosis" with the uncertainty and ambiguity of antibody evidence. *See, e.g.*, *Negron*, 28 M.J. at 775 ("[Appellant] was advised of a confirmed medical *diagnosis* that he *carries the HIV antibody*, a *viral condition* recognized as progenitor to the acquired immunodeficiency syndrome (AIDS) disease.") (emphasis added).

Because AIDS researchers prematurely selected an infectious agent, HIV, as the cause of AIDS, the resulting medical processes in place focus on detection and prevention of an infectious virus. However, because HIV has many characteristics that are inconsistent with viral behavior and has never been successfully identified as a pathogenic virus that causes AIDS in a way that meets Koch's Postulates, it is impossible to affirmatively identify HIV infection in a person. As a result, the laboratory evidence of HIV infection which may be presented to courts relies upon multiple levels of presumption which, when critically analyzed, cast doubt on both the infection and infectiousness of an individual who has screened positive for HIV antibodies in laboratory tests.

B. HIV in the Military Legal System: Acceptance and Response under the UCMJ

Military courts eagerly accepted and applied the government-endorsed explanation of AIDS: that it is a fatal[131] disease inevitably resulting from infection with a virus, specifically HIV.[132] Acceptance of this critical presumption—by accuseds, counsel, judges, and doctors—provided a faulty foundation for the application of pre-existing legal principles that, when applied (and sometimes stretched) to include the actions or omissions of servicemembers who were considered infected with HIV, reified this concept and enshrined it in appellate decisions as unquestionable fact.[133] The following sections explore the conditions under which the law

[131] United States v. Weatherspoon, 49 M.J. 209, 211 (C.A.A.F. 1998) ("[I]n the HIV cases . . . it was uncontested that death was the natural and probable consequence if the virus was transmitted and the victim developed AIDS."). *See, e.g.*, United States v. Klauck, 47 M.J. 24, 25 (C.A.A.F. 1997); United States v. Joseph, 37 M.J. 392, 396 (C.M.A. 1993); *Johnson*, 30 M.J. at 55, 56.

[132] *See, e.g.*, *Johnson*, 30 M.J. at 55.

[133] The HIV=AIDS=death linkage was so unassailable to CAAF that the court virtually shouted about it by using all caps. *Klauck*, 47 M.J. at 25, *overruled by* United States v. Gutierrez, No. 13-0522/AF, slip op. (C.A.A.F. Feb. 23, 2015) ("INDEED, ANY TIME A PERSON WILLFULLY OR DELIBERATELY EXPOSES AN UNSUSPECTING VICTIM TO A DEADLY OR DEBILITATING DISEASE OR INFECTION, SUCH AS HIV, POLIO, HEPATITIS B, OR CERTAIN VENEREAL DISEASES, THE ACTOR MAY BE LIABLE FOR AN AGGRAVATED ASSAULT—OR WORSE. . . ."). This strong admonition came in a case where the

developed and analyze how courts changed the law to address the public health concerns with HIV and AIDS.

1. Acceptance of the HIV Hypothesis in the Military Legal System

The normal scientific process never established HIV as the cause of AIDS;[134] however, the lack of reliable scientific proof did nothing to prevent a public health panic in the military. Recognizing that "HIV infection (AIDS) . . . is military relevant and will impact on all aspects of the military[,]" the U.S. military quickly took an aggressive posture toward this new "sexually transmitted disease that infects blood and kills its victims."[135] When decided the earliest military cases involving HIV, senior military leaders who were influencing policy held the view that "[AIDS], caused by the contamination of blood by [HIV-1] . . . is always fatal."[136] Everyone knew that HIV causes AIDS, so there was little need to dwell on this point while presenting evidence to meet the elements of an HIV offense.[137] Both early and later law review articles focused on charging tactics and prosecutorial considerations rather than critically analyzing the

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servicemember used a condom and did not ejaculate, yet at the time CAAF still had "no difficulty in concluding that the evidence [was] sufficient to sustain the findings." *Klauck*, 47 M.J. at 25. CAAF "expressly overruled" *Klauck* in its recent *Gutierrez* decision and abandoned its conclusion that "the fact that a male uses a condom during sexual intercourse is not a defense to [aggravated] assault." *See Gutierrez*, No. 13-0522/AF, slip op. at 13.

[134] Duesberg, *supra* note 7, at 755 ("[L]ess than a year [after 40% of AIDS patients were observed to have neutralizing antibodies to a retrovirus], in 1984, this virus was adopted as the cause of AIDS by the U.S. Department of Health and Human Services and the AIDS test was registered as a patent, even before the first American study on the virus was published."). *See* DUESBERG, *supra* note 23, at 132–68 (recounting the colorful history of how HIV came to be regarded as the cause of AIDS without scientifically reliable evidence or procedures).

[135] Colonel Edmund C. Tramont, *AIDS and Its Impact on Medical Readiness*, *in* THE LAND WARFARE PAPERS 9 (No. 6, Nov. 1990).

[136] General Jack N. Merritt (U.S. Army, Ret.), *Foreword to* Tramont, *supra* note 135, at v.

[137] While some reported military cases mention that an expert testified that HIV causes AIDS, the lack of any additional attention given to this issue on appeal indicates that the HIV/AIDS nexus itself never became an issue of any significance in a court-martial. *See, e.g.*, *Gutierrez*, No. 13-0522/AF, slip op. at 6 (expert testified about HIV transmission risks); *Klauck*, 47 M.J. at 25 (expert testified about HIV transmission and condom risks); United States v. Johnson, 30 M.J. 53, 55 (C.M.A. 1990) (expert testified about HIV transmission and probability of developing AIDS).

evidence for HIV or AIDS.[138] Though in the 1980s retroviruses had only recently been discovered and the means of detecting signs of HIV were almost as new as the claimed discovery of the virus itself,[139] no reported military appellate case ever mentioned any question about the legitimacy of the science establishing HIV as the infectious cause of AIDS. Just as bad facts make bad law, so do precautionary public health measures and dire epidemiological predictions.

The military recognized that it needed to swiftly, aggressively, and creatively adapt old laws to solve a new problem.[140] As the military departments implemented robust new programs and policies to identify and treat servicemembers infected with HIV, unit commanders assumed deterrence and punishment of activities which could spread AIDS as a priority.[141] The military justice system quickly adapted existing articles of the UCMJ to meet the new circumstances presented by HIV/AIDS without having to wait for Congress to create AIDS-specific punitive articles.[142] However, as the appellate courts decided HIV/AIDS cases, their decisions established remarkably strong legal interpretations that resulted in a nearly unbroken pattern of affirmed HIV convictions, even when the information presented in the case about HIV and AIDS

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[138] *See* Major Derek J. Brostek, *Prosecuting an HIV-Related Crime in a Military Court-Martial: A Primer*, ARMY LAW., Sep. 2009, 29 n.1 (focusing solely on technical legal aspects of the charging framework without consideration of the factual support of the framework); Elizabeth Beard McLaughlin, *A "Society Apart?" The Military's Response to the Threat of AIDS*, ARMY LAW., Oct. 1993, 3, 3–16 (analyzing the epidemic, its application to the military, and the cases shaping the law); Wells-Petry, *supra* note 19, at 17 (discussing substantive legal issues with charging HIV-related crimes).

[139] *See* Duesberg, *supra* note 7, at 755.

[140] Wells-Petry, *supra* note 19, at 17–18.

[141] *See* Wells-Petry, *supra* note 19, at 17–18.

[142] Wells-Petry, *supra* note 19, at 19–26. *See also Gutierrez*, No. 13-0522/AF, slip op. at 14–15 (citing Brostek, *supra* note 138, at 29).

differed wildly from the sweeping factual declarations and dire predictions from "experts" that had originally created the court's HIV precedents.[143]

Accused servicemembers themselves had compelling reasons to believe they were highly infectious, even if they had no capacity to cause AIDS. Some of the strongest HIV-related statements cited to support the decisions of appellate courts came from the accused's own admissions and concessions.[144] The accused's beliefs about his medical condition, based upon his own understanding of HIV and AIDS, became evidence that appellate courts used to support their decisions, even if that understanding was inadequate, incorrect, or completely without actual personal knowledge.[145] Yet being told that one has HIV is an intensely defining, identity-changing experience that fundamentally alters how a person makes decisions and how he views his very life.[146] Questioning his infection with HIV required an accused servicemember to question his very identity. Thus, a servicemember's medically-defined identity, and the understanding and assumptions that went along with it, would disincentivize accuseds from questioning the factual basis for their prosecution or conviction. Despite the accused's lack of personal knowledge and scientific understanding, his admissions and concessions during providency not only convicted him, but also helped shape perceptions about HIV in military law.

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[143] *See infra* pp, 33–35.

[144] *See, e.g.*, Dacus 66 M.J. at 239 (using Dacus' own testimony during providency to disregard appellant's arguments challenging the magnitude of the harm prong) ("In fact, Dacus himself testified: 'HIV is bad because it can cause bodily harm at one point in time of your life. It can cause death and it could in fact—it will change your whole life.'").

[145] *See, e.g.*, Dacus, 66 M.J. 239-40 ("Dacus admitted that the presence of HIV in pre-ejaculate fluid makes transmission of the virus during sexual intercourse possible, even while wearing a condom.").

[146] SEBASTIAN RINKEN, THE AIDS CRISIS AND THE MODERN SELF, BIOGRAPHICAL SELF-CONSTRUCTION IN THE AWARENESS OF FINITUDE xi (2000). Two primary factors combine to make HIV diagnosis stand out as an intensely defining experience: "the intensity of the shock caused by diagnosis and the relatively long time of survival enjoyed by many after that event." *Id.* "For many people with HIV, diagnosis constitutes a—or even *the*—crucial biographical turning-point." *Id. See, e.g.*, Dacus 66 M.J. at 239 (accused's testimony) ("[HIV] will change your whole life.").

Judges were not immune to the public health panic. Though the U.S. legal system makes judges the "gatekeeper" for guarding the reliability of "all expert testimony" presented to the court,[147] the Supreme Court did not adopt its scientifically-oriented *Daubert* legal standard for admitting scientific testimony until several years *after* the first critical HIV appellate cases were decided in the military.[148] When courts were deciding the formative HIV cases, the rule governing "testimony by experts" only tested whether the evidence "will assist the trier of fact to understand the evidence or to determine a fact in issue."[149] MRE 702 did not change to provide guidance on implementing the *Daubert* factors until the 2004 Amendment.[150] Therefore, the opponents of the mainstream HIV/AIDS hypothesis have survived focused judicial scrutiny of their scientific methods while the proponents of the hypothesis have merely provided their testimony over their years without ever being subjected to the same judicial scrutiny.[151]

Indeed, the lack of evidence that *anyone* challenged the HIV hypothesis indicates that counsel for both sides operated under the same misapprehensions as judges. Because courts treated HIV testimony permissively, evidence or expert testimony about HIV infection became conclusive proof to the court-martial that the servicemember was infected with HIV and that he was therefore infectious, regardless of the weight or reliability of the evidence.[152] Judging by the

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[147] *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147–49 (1999).

[148] *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

[149] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL.R. EVID. 702 (1984), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/manual-1984.pdf ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.").

[150] MCM, *supra* note 10, App. 22, MIL.R. EVID. 702.

[151] *See Navy Dismisses HIV Charges*, OFFICE OF MED. AND SCIENTIFIC JUSTICE (Nov. 30, 2012, 3:08 PM), http://www.omsj.org/human-rights/aeanrjax.

[152] *See, e.g.*, United States v. Klauck, 47 M.J. 24, 25 (C.A.A.F. 1997).

absence of objection or serious challenge in appellate decisions, all the lawyers in the courtroom gravely regarded *any* evidence of HIV as the eventual means of causing AIDS and death.[153] Moreover, because lawyers commonly look to appellate case law as one of their most important and effective ways of becoming knowledgeable in a new and intimidating legal subject, the stark, yet inaccurate, assertions about HIV and AIDS enshrined in case law would tend to cause counsel working on HIV cases to perpetuate the oversimplification of issues relating to HIV infection, infectiousness, and AIDS causation.

2. Responding to HIV with the UCMJ

Military courts developed particularly strong and expansive standards for their applications of Articles 90/92 and 128 to HIV cases. This created a chasm that increasingly distanced legal principle from reality—the *law* grew *stronger* even as the *facts* supporting that law gradually *weakened*.

a. Orders Violations: Article 90 or 92

Prosecutors frequently use Article 90 or Article 92 to punish a servicemember with HIV for violating the "safe sex" order from his commander.[154] Historically, in accordance with service regulations, commanders directed servicemembers who had been informed they were infected with HIV to inform their partners of their HIV status and to use a condom when engaging in

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[153] *See, e.g.*, United States v. Negron, 28 M.J. 775 (A.C.M.R. 1989) (illustrating how loosely courts used facts to connect HIV antibody evidence to AIDS) ("[Appelant] was advised of a confirmed medical diagnosis that he carries the HIV *antibody*, a viral condition recognized as progenitor to the acquired immunodeficiency syndrome (AIDS) disease.") (emphasis added).

[154] *See, e.g.*, United States v. Pritchard, 45 M.J. 126, 128 (C.A.A.F. 1996); United States v. Dumford, 30 M.J. 137, 137–38 (C.M.A. 1990); United States v. Womack, 29 M.J. 88, 89 (C.M.A. 1989); *Negron*, 28 M.J. 775, 775–76.

sexual activity.[155] Today, though the DoD only requires "training" of servicemembers found to have evidence of HIV infection,[156] regulations differ significantly across the services on the role of the commander in that process and whether a punitive order will be given.[157] As a result, it may be less likely now that an HIV case will include a "safe sex" order from a commander or an accompanying Article 90 or 92 violation of that order.

The Court of Military Appeals initially established the constitutionality of such "safe sex" orders by finding that they were "specific, definite, certain," without being "overly broad in scope or impos[ing] an unjust limitation on personal rights," and that they had valid military purposes.[158] It next determined that the military had a legitimate interest in applying the order to restrict sexual contact with civilians.[159] Finally, its successor, the Court of Appeals for the Armed Forces, favorably commented on a military judge's determination that the military

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[155] *See Pritchard*, 45 M.J. at 128 (finding that order to "verbally advise all prospective sexual partners of your diagnosed condition prior to engaging in any sexual intercourse . . . [and] to use condoms should you engage in sexual intercourse with a partner" applied to sodomy as well); *Dumford*, 30 M.J. at 137–38 (stating the order was substantially the same as that given in *Womack*); *Womack*, 29 M.J. at 89 ("[I]nform all present and future sexual partners of your infection . . . and avoid transmitting the infection to other persons by taking affirmative steps during any sexual activity to protect your sexual partner from coming into contact with your blood, semen, urine, feces, or saliva . . . ."); *Negron*, 28 M.J. at 775 ("[A]ppellant received a verbal and written order from his commanding officer requiring that he inform prospective sex partners of his diagnosed HIV condition before engaging in intimate sexual relations and that he wear a condom when having intimate sexual relations.").

[156] *See* DoDI 6485.01 enclosure 3, para. 3 ("A Service member with laboratory evidence of HIV infection *will receive training* on the prevention of further transmission of HIV infection to others and the legal consequences of exposing others to HIV infection.") (emphasis added).

[157] *See* AR 600-110 para. 1-14, 1-15, 1-16 (22 Apr. 14) (requiring commanding officers to provide counseling on a list of service policies which make no mention of sexual practices); SECNAVINST 5300.30E para. 12.b.(1)(a) ("[HIV antibody positive individuals] shall be advised that they will be directed to follow these preventive medicine procedures by their command."); U.S. DEP'T OF NAVY, BUREAU OF MED. AND SURG., GUIDE FOR COMMANDING OFFICERS AND OFFICERS IN CHARGE OF HIV-INFECTED MEMBERS (April 2014), *available at* http://www.med.navy.mil/sites/nmcphc/Documents/nbimc/Guide-for-COs-and-OICs.pdf (providing procedural and counseling guidance to guide commanders, but making no mention of any order or directive that needs to be given to the servicemember.); AFI 44-178 appdx. 7, 13 (providing specific and detailed tasks, instructions, and forms for "Order to Follow Preventive Medicine Requirements").

[158] *Womack*, 29 M.J. at 90–91 (establishing as valid military purpose the protection and preservation of personal health necessary for unit readiness and ability to accomplishment mission).

[159] *Dumford*, 30 M.J. at 137.

purpose of protecting the civilian community could be extended to require a *married* servicemember to wear a condom during sexual intercourse with his wife.[160]

In 1989, it seemed fair to have a policy that commanders issue "safe sex" orders so servicemembers could be held accountable for deliberately failing to provide notification of their status or use protection as required. Contrary to the statutes in many states "making it a crime to expose others to sexually-transmitted diseases," this was considered by our courts to be a "less restrictive means to limit the spread of this infectious disease."[161] But once additional cases determined that "informed consent was not a defense to unprotected sex . . . and that using a condom is not a defense to an HIV aggravated assault," servicemembers could still be punished for aggravated assault under Article 128 even when they thought they were fully complying with the terms of their "safe sex" order by having consensual, fully informed, and protected sex.[162]

The CAAF's recent decision in *Gutierrez* indirectly affected "safe sex" orders in at least two ways. First, it made the likely legal effects of violating the order more consistent with the actual language of the order. Previously, the orders put servicemembers on notice of the likely legal consequences of violations, but did not give notice of the vast criminal liability that extended to

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[160] United States v. Pritchard, 45 M.J. 126, 131 (C.A.A.F. 1996) (finding no plain error, without addressing the constitutional questions, in the military judge's determination that "the military's interest in preventing egregious injury to [the appellant's] spouse and transmission of the disease to the civilian community" was a valid justification for the order's applicability to the servicemember's marital sexual relations). *But see* United States v. Bygrave, 46 M.J. 491, 494 n.8 (C.A.A.F. 1997) ("We note a certain irony in the Government's present assertion of a compelling interest in celibacy by HIV-positive servicemembers: although the military provides extensive training and instruction to servicemembers when they contract the virus, the military has not in that context expressly mandated that HIV-positive service-members refrain from all sexual intercourse.").

[161] *Womack*, 29 M.J. at 90.

[162] Brostek, *supra* note 138, at 32. *See* United States v. Klauck, 47 M.J. 24, 25 (C.A.A.F. 1997), *overruled by* United States v. Gutierrez, No. 13-0522/AF, slip op. (C.A.A.F. Feb. 23, 2015) (finding that using a condom is not a defense to HIV aggravated assault because the risk of harm is too great if anything goes wrong with the protective device); *Bygrave*, 46 M.J. at 493 (determining that consent is not a defense to HIV-based aggravated assault for unprotected sex); United States v. Outhier, 45 M.J. 326, 330 (C.A.A.F. 1996) ("One cannot consent to an act which is likely to produce grievous bodily harm or death.").

even the most unlikely of scenarios through military courts' applications of Article 128.[163] Still, the excessive application of Article 128 did not excuse servicemembers' safe sex orders violations.[164] In this way, *Gutierrez* affirms the legitimacy of HIV safe sex orders. Second, however, *Gutierrez* undermines the factual basis for HIV safe sex orders by acknowledging that a sexual act with an HIV-infected servicemembers is not *per se* likely to cause harm.[165]

b. Aggravated Assault: Article 128

For decades, prosecutors used Article 128 to punish HIV servicemembers for many variations of sexual contacts and acts allegedly done with "means . . . likely to produce death or grievous bodily harm."[166] Article 128 states: "Any person subject to [the UCMJ] who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault . . . ."[167] Moreover, "[a]ny person . . . who . . . commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm . . . is guilty of aggravated assault . . . ."[168] To determine whether the "weapon, means, or force" used constitutes a means likely to produce death or grievous bodily harm, military courts use a two-pronged test that weighs both the magnitude and risk of harm.[169]

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[163] *Bygrave*, 46 M.J. at 494 n.8.

[164] *See, e.g.*, *id.* at 492 (servicemember convicted of aggravated assault when provided notice of HIV and had protected and unprotected sex with partner); *Klauck*, 47 M.J. at 24 (servicemember convicted of aggravated assault when wore condom but did not advise partner of HIV).

[165] *See infra* Part II.C.3 (discussing legal and factual issues underlying the constitutionality of HIV safe sex orders).

[166] 10 U.S.C. § 928(b)(1) (2014).

[167] *Id.* at § 928.

[168] *Id.*

[169] United States v. Joseph, 37 M.J. 392, 397 (C.M.A. 1993).

However, the CMA amputated those two prongs in the HIV cases, allowing the government to convict servicemembers without having to prove magnitude or likelihood of harm. First, CMA determined that the magnitude of harm was indisputably great in every HIV case because it was repeatedly uncontested as an issue.[170] Then, in HIV-based aggravated assaults only, the CMA interpreted "likely" as "not the statistical probability of HIV invading the victim's body, but rather the likelihood of the virus causing death or serious bodily harm *if* it invades the victim's body."[171] The Court further determined that the "probability of infection need only be 'more than merely a fanciful, speculative, or remote possibility.'"[172] This turned a two-pronged risk analysis test into a *per se* rule of criminal liability that presumed the risk of harm, ignored the risk of transmission, and therefore tolerated no risk at all. [173] It meant that servicemembers could be punished for having sex after being told they had HIV, regardless of the facts.

Application of this legal standard showed that it was overbroad. Military courts used the liberal definition of "likely" to establish and affirm findings of guilty on aggravated assault charges even when transmission of HIV was extraordinarily unlikely or even impossible. For example, when a servicemember with HIV erected a barrier and performed anonymous fellatio on others, one appellate court sustained his conviction despite the impossibility of saliva

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[170] *See* United States v. Weatherspoon, 49 M.J. 209, 211 (C.A.A.F. 1998) ("The second prong of the likelihood analysis, consideration of the magnitude of the risk, was not at issue in the HIV cases. In those cases, it was uncontested that death was the natural and probable consequence if the virus was transmitted and the victim developed AIDS.") (citing United States v. Klauck, 47 M.J. 24, 25 (C.A.A.F. 1997); *Joseph*, 37 M.J. at 396; United States v. Johnson, 30 M.J. 53, 55, 56 (C.M.A. 1990)).

[171] *Joseph*, 37 M.J. at 397.

[172] *Id.* at 397.

[173] *See* United States v. Gutierrez, No. 13-0522/AF, slip op. at 10–11 (C.A.A.F. Feb. 23, 2015) (citing *Joseph*, 37 M.J. at 396–97) ("The *Joseph* court focused exclusively on the likelihood that death or grievous bodily harm would occur in the event of transmission, without consideration of whether the risk of transmission was itself likely.").

transmitting HIV during the oral sex.[174] In a case where a female soldier with HIV used protection during sexual intercourse and the government expert provided extraordinarily small odds of infection and testified that the possibility was "remote," the trial court still convicted the solider of aggravated assault, though the service appellate court affirmed only a battery.[175] In another case, CAAF affirmed the conviction of a servicemember who wore a condom and did not ejaculate during sex based upon the expert's testimony that condoms sometimes fail or are not used properly.[176] Even when transmission of HIV was physically impossible because the accused "never actually tried to penetrate [the victim's] anus with his penis," and a medical doctor testified as an expert "that physical contact such as actually occurred in this case is 'unlikely' to cause transmission of the AIDS virus," the court still affirmed conviction for aggravated assault.[177] The military courts' particularly inclusive standard for HIV aggravated

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[174] United States v. Herndon, 2010 CCA LEXIS 478 (N.M.C.C.A. 2010) (sustaining aggravated assault conviction for servicemember who erected a barrier in his house and anonymously performed fellatio on two males). *Cf. HIV Transmission*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 23, 2014), http://www.cdc.gov/hiv/basics/transmission.html (stating, "HIV cannot be spread through saliva . . ."); *Oral Sex and HIV risk*, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 21, 2014), http://www.cdc.gov/hiv/risk/behavior/oralsex.html ("If the person *performing* oral sex has HIV, blood from their mouth *may* enter the body of the person receiving oral sex through the lining of the urethra . . . vagina, cervix, or anus, or through cuts and sores.") (emphasis added).

[175] United States v. Hurts, 2014 CCA LEXIS 284 at 2, 5 (A. Ct. Crim. App. 2014). The Army Court of Criminal Appeals cited testimony of the doctor who testified "that the risk of infection for female-to-male HIV transmission during sexual intercourse is 5 in 10,000 (i.e., .05%) and that using condoms consistently and appropriately further reduced the risk of transmission by approximately 87%." *Id.* As a result, the Army appeals court did *not* affirm conviction of aggravated assault for the accused's *protected* sex where likelihood of transmission was .0065%, but *did* affirm conviction of aggravated assault for *unprotected* sex where likelihood of transmission was .05%. *See id.*

[176] United States v. Klauck, 47 M.J. 24, 25 (C.A.A.F. 1997) (omitting any statistics about likelihood but citing testimony of doctor that seminal fluid secretions increase during intercourse, that condoms must be latex to be effective, that they must "be properly stored and lubricated . . . and worn," that "there is about a 6-percent rate of breakage even in properly worn condoms," and that "it is possible to transmit the virus without ejaculating because the virus is present in the pre-ejaculate fluid").

[177] United States v. Johnson, 30 M.J. 53, 55 (C.M.A. 1990). The court goes on to discuss in depth its rationale for affirming the Article 128 conviction under these circumstances, pointing out that the first element of the article states "[t]hat the accused *attempted* to do, offered to do, or did bodily harm to a certain person[.]" *Id. at 56.*

assault cases resulted in significant punishment of individuals whose conduct, by any reasonable standard, was not at all *likely* to produce harm.

Gutierrez directly overruled[178] the court's prior HIV-specific standard and returned to the only standard contained in the statute: "Whether the means used [in the assault] were 'likely to produce death or grievous bodily harm.'"[179] Now, "in cases involving HIV exposure, the government will be held to its burden of proving every element of the charged offense in the same manner that is required in other cases invoking the same statute."[180]

In *Gutierrez*, CAAF began the process of correcting hastily constructed legal standards that relied upon, reified, and reinforced the shaky science of HIV and AIDS while remaining impervious to the truly complicated nature of proving an HIV-related crime. However, CAAF's bold adjustment only resolved the most obvious problem in the military's HIV law. These significant new changes now require fresh consideration of the challenges associated with proving that a servicemember was infected with HIV, could transmit it, and that transmission would infect another and cause grievous bodily harm or death through AIDS.

C. Factual & Legal Challenges to HIV/AIDS in Courts-Martial

Popular acceptance of the idea that AIDS is an infectious disease caused by HIV restrained the scope of legal and factual challenges to HIV charges. Courts decided issues such as the legality of certain orders, the relevance of using protection during sexual acts, and the ability or inability of others to consent to sexual acts with servicemembers infected with HIV while the parties to these cases blithely accepted that the accused was actually infected with HIV, that his

[178] United States v. Gutierrez, No. 13-0522/AF, slip op. at 17 (C.A.A.F. Feb. 23, 2015).

[179] *Id.* at 11 (quoting United States v. Outhier, 45 M.J. 326, 328 (C.A.A.F. 1996)).

[180] *Id.* at 15.

infection would spread to others through sexual contact, and that a person once infected would eventually develop AIDS and likely die.

The following sections discuss these three critical concepts underlying HIV prosecutions and analyze how military courts have handled them. They appear slightly out of order to show the chronological development of the bases for questioning the HIV status quo. First, the conventional challenge to HIV assault charges shows that the likelihood of HIV transmission in a case is unlikely. Second, the emerging challenge shows that limited medical procedures and the inherent limitations of HIV testing create significant doubt about whether the accused is actually infected with HIV. Finally, the comprehensive challenge confronts the lack of evidence that AIDS is infectious and caused by HIV and questions the government's legal basis for prosecuting these offenses.

1. Conventional Challenge to HIV Assault Charges: Unlikely Infectiousness

Early HIV courts-martial failed to recognize that HIV must be effectively transmitted and then infect another person before it can cause AIDS; instead, they focused on the "the likelihood of the virus causing death or serious bodily harm *if* it invades the victim's body."[181] Military courts first ignored the reality of this logical distinction,[182] then focused on the nature of the sex act, rather than the virus itself, as the means likely to produce grievous bodily harm.[183]

[181] United States v. Joseph, 37 M.J. 392, 397 (C.M.A. 1993).

[182] United States v. Johnson, 30 M.J. 53, 56 n.5 (C.M.A. 1990) ("Whether the means was alleged to be the virus itself, or the medium and the virus, does not seem significant to us.")

[183] Brostek, *supra* note 138, at 30–31, n.20. *See* United States v. Schoolfield, 40 M.J. 132, 135 (C.M.A. 1994) (upholding an aggravated assault conviction under the "intentional-battery theory of assault with the bodily harm being unprotected sexual intercourse"); *Joseph*, 37 M.J. at 395–96 (upholding an aggravated assault conviction under a battery theory).

Specifically, the first case dealing with an HIV-based aggravated assault focused on the risk of harm as the likelihood of getting AIDS from HIV.[184] At the time, the medical testimony provided that such risk was as high as 50 percent.[185] Yet the court completely overlooked the probability of *transmitting* HIV or the victim *becoming infected* with HIV, [186] two prerequisites for AIDS. Subsequent cases engaged in similar logical lapses without providing detailed analysis, a natural result of the lack of any requirement to do so under the HIV-specific standard for aggravated assault charges.[187] After years of military courts bypassing key facts under cover of a skewed legal standard, the *Gutierrez* court attacked the issue that had been ignored for so long: "whether exposure to the *risk of HIV transmission* is 'likely' to produce death or grievous bodily harm."[188] Finally, under the military's law, the sexual organs, bodily fluids, and more benign body parts of a person with HIV lost their unambiguous and permanent status as weapons of certain death.[189]

In *Gutierrez*, CAAF focused on the first part of transmission: viral movement through certain means from one body to another. The HIV expert used Gutierrez's viral load to estimate a "high-end statistic of 1-in-500 exposures resulting in HIV transmission" for "unprotected vaginal intercourse."[190] In such unlikely circumstances, CAAF "conclude[d] that HIV

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[184] United States v. Stewart, 29 M.J. 92, 93 (C.M.A. 1989).

[185] *Id.*

[186] *See* Brostek, *supra* note 138, at 29 (bemoaning the lack of "comprehensive analysis on the proper use of Article 128" in early cases where the court "simply found it to be appropriate.").

[187] *Id. See, e.g.*, United States v. Johnson, 30 M.J. 53 (C.M.A. 1990).

[188] United States v. Gutierrez, No. 13-0522/AF, slip op. at 9 (C.A.A.F. Feb. 23, 2015) (emphasis added).

[189] *See id.* at 10.

[190] *Id.* at 14.

transmission is not the likely consequence of unprotected vaginal sex."[191] But the latest statistics published by the CDC show that even unprotected receptive anal intercourse, the most likely sexual act to result in transmission of HIV, will result in transmission a mere 1.38 percent of the time.[192] Therefore, aggravated assault now appears to be a facially inappropriate charge in *any* sexual act where HIV is involved, unless unusual circumstances significantly increase the risk of transmission in a particular case.[193]

In addition to the factors affecting *transmission*, still other factors determine the risk of lasting and potentially harmful *infection* by HIV in a potential recipient.[194] As with other viruses, some people will be more able than others to develop antiviral immunity or continual resistance to HIV.[195] To use legal terms relating to assault, the figurative weapon of potential

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[191] *Id.*

[192] *See HIV Transmission Risk*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/hiv/policies/law/risk.html (last updated July 1, 2014). *Cf. Gutierrez*, No. 13-0522/AF, slip op. at 12 (citing the same CDC page to corroborate the expert's testimony about risk of transmission).

[193] *See HIV Transmission Risk*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/hiv/policies/law/risk.html (last updated July 1, 2014) (citing only narrowly-construed, allopathic factors and omitting more holistic factors further affecting immunity and susceptibility to infection).

[194] "Continuing infection" here is meant to distinguish this from the "temporary infection" that naturally occurs when the body is initially infected by a new virus, counters it with antibodies, and thereby develops an active, natural immunity to the virus. *See Immunity Types*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/vaccines/vac-gen/immunity-types.htm (last updated May 19, 2014).

[195] *See, e.g.*, W.C. Goh et al., *Protection Against Human Immunodeficiency Virus Type 1 Infection in Persons with Repeated Exposure: Evidence for T Cell Immunity in the Absence of Inherited CCR5 Coreceptor Defects*, 179 J. INFECTIOUS DISEASES 548 (1999), *available at* http://jid.oxfordjournals.org/content/179/3/548.full.pdf. +html ("cellular immunity" to HIV "suggests either undetected infection or protective immunity"); Carey Farquhar et al., *Human Leukocyte Antigen (HLA) B*18 and Protection against Mother-to-Child HIV Type 1 Transmission*, 20 AIDS RESEARCH AND HUMAN RETROVIRUSES 692 (2004), *available at* http://dx.doi.org/10.1089%2F0889222041524616 ("HLA B*18 may protect breast-feeding infants against both early and late HIV-1 acquisition."); George Makedonas et al., *HIV-specific CD8 T-cell activity in uninfected injection drug users is associated with maintenance of seronegativity*, 16 AIDS 1595 (2002), *available at* http://journals.lww.com/aidsonline/Fulltext/2002/08160/HIV_specific _CD8_T_cell_activity_in_uninfected.4.aspx ("[HIV-exposed, uninfected subjects (EU)] who have developed HIV-specific effector responses are at a reduced risk for seroconversion compared with EUs who do not develop this type of immunity. This observation supports the hypothesis that HIV-specific effector responses are a correlate of immune protection from HIV infection.").

HIV can have its manner of use changed depending on the recipient/victim involved.[196] The risk of harm or death inherent in transmission of a virus thus depends on both the likelihood of its transmission through a particular means *and* the likelihood that it will create lasting infection in a particular victim.

In sum, *Gutierrez* provided significant resolution on the issue of transmission by establishing that the government must prove that transmission is *likely* based on the facts of each case.[197] Given the low likelihood of sexual transmission of HIV today, aggravated assault should no longer even be charged in HIV cases. But if it is, the determination of the likelihood of transmission must consider both the general estimates based upon the specific type of sexual exposure and the variety of additional factors affecting both transmission and infection. Just as the accused's actual infection and immune status are relevant to the likelihood of *transmission*, the victim's immune status is relevant to the risk that any such transmission will cause *infection* with HIV.

2. Emerging Challenge to HIV Charges: Unproven Infection

Though legal questions about the likelihood of grievous bodily harm have been the focus of recent appeals, defense teams have recently challenged the government's evidence that the

[196] *See* United States v. Gutierrez, No. 13-0522/AF, slip op. at 10 (C.A.A.F. Feb. 23, 2015) (quoting Ari E. Waldman, *Exceptions: The Criminal Law's Illogical Approach to HIV-Related Aggravated Assaults*, 18 VA. J. SOC. POL'Y & L. 550, 591 (2011)) ("[I]t is not the weapon that must likely cause great harm, but rather the manner in which it is used must be likely to cause the resulting harm."). This is like the difference between punching a boxer and an infant in the head. In one case, there may be a simple battery with virtually no potential for harm, whereas in the other there may be an aggravated assault with significant likelihood of death. All else being equal, an accused with HIV who has sex with a person who is severely immunocompromised may be acting with a "means likely to produce death or grievous bodily harm" under Article 128, whereas the same act with an extremely healthy person may pose very little threat of harm and fail to meet that standard.

[197] United States v. Gutierrez, No. 13-0522/AF, slip op. at 15 (C.A.A.F. Feb. 23, 2015).

accused is actually infected with HIV.[198] Scientific and medical experts who understand the limitations of HIV testing and complexities of "diagnosis" can show numerous inadequacies in the military's procedures for identifying servicemembers with HIV infection.[199] By illustrating the limitations of HIV tests and subsequent medical evaluation in several cases, defense teams have shown considerable gaps in the evidence of the accused's HIV infection. In recent years, this type of inquiry into the government's evidence has, with few exceptions,[200] resulted in dismissal[201] of charges or produced findings of not guilty on HIV-related charges at trial.[202]

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[198] *See HIV Innocence Group*, OFFICE OF MEDICAL AND SCIENTIFIC JUSTICE, http://www.omsj.org/innocence-group (last visited Jan. 28, 2015) (listing 8 cases where the defense challenged the accused's HIV infection).

[199] *See* Brief in Support of Petition Granted at 7–8, United States v. Gutierrez, (USCA Dkt. No. 13-0522/AF), Crim. App. No. 37913, *available at* http://www.armfor.uscourts.gov/newcaaf/briefs/2014Term/Gutierrez130522AppellantBrief.pdf (summarizing discrepancies including lack of sufficient safeguards of sample, insufficient chain of custody, lack of subsequent confirmatory testing, and lack of clinical attention to the many sources of potential triggers for false positive HIV test results in the appellant's medical history). *See also Gutierrez*, No. 13-0522/AF, slip op. at 10 ("Appellant contends . . . he has never been validly diagnosed with HIV, and submits post-trial affidavits challenging his diagnosis. Appellant did not challenge the fact of his HIV diagnosis at trial, and is not entitled to relitigate an essential fact of the case before this Court . . . .").

[200] *See, e.g.*, United States v. Pinkela, 2014 CCA LEXIS 852, 1 (A.C.C.A. Nov. 14, 2014). In *Pinkela*, a lieutenant colonel was "convicted . . . contrary to his pleas, of two specifications of willful disobedience of a superior commissioned officer, one specification of abusive sexual contact, one specification of aggravated assault, one specification of conduct unbecoming an officer, and one specification of reckless endangerment in violation of Articles 90, 120, 128, 133, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 890, 928, 920, 933, 934 (2006)." *Id.* at 1. The military judge, sitting as a general court-martial, adjudged a dismissal and one year confinement as sentence. *Id.* Pinkela engaged in particularly egregious conduct with a junior officer. *See id.* at 3. The medical expert testified that LTC Pinkela's "'relatively significant viral load'" would, under the circumstances, which included insertive anal sex, still only produce an estimated "rate of transmission [of] 1.4% [per act] for HIV." *Id.* at 4–5. Considering the many aggravating factors in this court-martial of a senior officer who was also found guilty of a variety of non-HIV-related misconduct, the relatively lenient sentence may be due in part to the limited nature of the evidence that the accused was actually infected with HIV. *See* Terry Michael, *Criminal HIV Laws Compounded by Confusion Over HIV Test*, OFFICE OF MEDICAL AND SCIENTIFIC JUSTICE (24 Jul. 2012), http://www.omsj.org/authors/criminal-hiv-laws-compounded-by-confusion-over-hiv-test.

[201] *See, e.g.*, United States v. R.L. (MCLB Barstow, CA, charges withdrawn and dismissed on 7 Oct. 2011), *available at* http://www.omsj.org/cases/2011/leyva/withdrawal.jpg; United States v. R.S. (NAS Jacksonville, FL, pretrial agreement reached for simple battery on 29 Nov. 2012), *available at* http://www.omsj.org/cases/2012/rs29Nov12.pdf; United States v. S.G. (all charges dismissed, to include non-HIV-related charges, 9 Jan. 13), *available at* http://omsj.org/2012/millios.pdf; United States v. T.M., (Fort Benning, GA, all charges dismissed on 22 Mar. 13), *available at* http://www.omsj.org/cases/2013/ssgbenning22mar2013.jpg; United States v. G.A. (Seymour Johnson Air Force Base, HIV and sexual assault charges dismissed on 13 Nov. 13), *available at* http://www.omsj.org/cases/2013/legg.pdf.

Scientific experts such as Dr. Rodney Richards[203] have shown the limitations of the government's evidence of HIV infection by explaining the limitations of HIV tests. In the recent court-martial of an Army sergeant, which resulted in findings of not guilty by a military judge on all HIV-based charges,[204] Dr. Richards testified that none of the HIV tests used for the servicemember were "validated or approved by the [Food and Drug Administration (FDA)] for use in diagnosing actual infection with HIV."[205] He explained that "the package inserts of the so-called confirmatory Western Blot test" indicates that "persons with positive results are only 'presumed to be positive for antibodies to HIV.'"[206] Under the Centers for Disease Control (CDC) guidelines established in 1987, individuals presumed to have HIV antibodies are further "presumed to be infected with the virus."[207] Thus, "[i]n the absence of any symptoms to inform

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[202] *See, e.g.*, United States v. Dixon (Fort Bragg, NC, acquitted of all HIV-related charges on 17 May 2012), *available at* http://www.omsj.org/issues/ustd.

[203] Dr. Richards is a biochemist who worked for both Abbot Laboratories and Applied Molecular Genetics (now simply "Amgen"), the world's largest independent biotech company. Terry Michael, *Military judge acquits Army sergeant of failure to disclose HIV "status" to sex partners, with doubts raised about validitiy of "HIV tests,"* TERRYMICHAEL.NET (8 Jun. 2012), http://www.terrymichael.net/Htm_SiteArticles/ArmySargeantAcquittedInHIVPanicCase.htm. Dr. Richards participated in developing the initial blood tests for HIV antibodies (ELISA). *Id.* He holds several patents associated with this technology. *Id.*; *Rodney M Richards, Inventor*, PATENTBUDDY, http://www.patentbuddy.com/Inventor/Richards-Rodney-M/833955#More (last visited Mar. 9, 2015).

[204] Michael, *supra* note 203 (reporting that military judge acquitted accused of all HIV-based aggravated assault charges and only convicted him of battery for throwing a bottle at his girlfriend, resulting in a sentence of 120 days confinement which had already been served in pretrial confinement).

[205] Tim Cavanaugh, *HIV Revisionism in Fort Bragg Acquittal*, REASON (12 Jun. 2012, 11:09 AM), http://reason.com/blog/2012/06/12/hiv-revisionism-in-fort-bragg-acquittal.

[206] *Id.*

[207] *Id*. Current information published by the CDC is more artful in avoiding the term "presumption," but concedes that immunoassays detect antibodies and even the primary "follow-up" test, the Western Blot, still checks for antibodies. *See HIV/AIDS Testing*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/hiv/basics/testing.html (last updated 15 Jan. 2015). *See also* Goodson, *supra* note 17, at 2 (summarizing evolution of language in CDC guidelines).

a medical diagnosis, the link between HIV and a positive Western Blot is nothing more than one presumption layered on top of another presumption."[208]

Careful clinical evaluation of the accused's medical history reveals the same lack of confirmation of HIV infection. Medical experts with extensive clinical experience, such as Dr. Nancy Banks,[209] have evaluated an accused's medical record to determine the depth of medical diagnosis provided and identified factors that could have caused false-positive HIV results.[210] A servicemember's medical record may show that the he received numerous vaccinations or experienced a variety of illnesses in the months leading up to the reactive HIV antibody test. Scores of conditions, to include the flu vaccine and many non-infectious illnesses, have been shown to "conduce to false-positive 'HIV' tests."[211] However, military medical officers do little, if anything,[212] to examine and rule out factors that could cause false-positive results. Military regulations and medical policies do not require or even mention efforts to eliminate potential false-positives when a servicemember tests positive for HIV. [213] As a result, when scrutinized

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[208] Cavanaugh, *supra* note 205.

[209] Dr. Banks is a graduate of Harvard Medical School, is board certified in obstetrics and gynecology, and has 25 years of clinical experience. *About*, NANCY BANKS MD, http://www.nancybanksmd.com/index.php?option=com_content&view=article&id=48&Itemid=53 (last visited 9 Mar. 2015).

[210] Michael, *supra* note 204.

[211] Henry Bauer, THE CASE AGAINST HIV sec. 3.2.2., http://thecaseagainsthiv.net/#REFU0189A (last updated Jan. 2015) (citing each condition with supporting reference(s) in scientific literature).

[212] Michael, *supra* note 204 ("After noting he was aware of dozens of conditions that can cause cross-reactivity on HIV tests, Dr. Whitman testified he did not rule out any possible cross-reactivity, and that he did not follow-up to determine if what he was reading was accurate.").

[213] *See* DoDI 6485.01 enclosure 3, para. 3 (requiring "aggressive disease surveillance and health education" with "laboratory evidence of HIV infection" as the sole trigger); SECNAVINST 5300.30E para. 5.a, 12.b (directing that "[a]ll personnel with either serologic evidence of HIV infection or positive virus identification will be considered to have HIV infection . . ." and requiring a probing "epidemiological assessment" that explores past history only to identify others "at risk of infection" by contact with the servicemember); U.S. DEP'T OF NAVY BUREAU OF MEDICINE AND SURGERY, NOTICE 6222, REPORTING HUMAN IMMUNODEFICIENCY VIRUS RISK AND EXPOSURE DATA para. 3 (16 Feb. 2010) [hereinafter BUMEDNOTE 6222] (requiring Navy HIV Evaluation and Treatment Units

from the perspective of clinical diagnosis, the medical evidence and testimony presented in court fails to establish with "reasonable medical or scientific certainty" that the accused is infected with HIV.[214]

Evidence of HIV infection presented in a court-martial fails to prove or even reliably indicate HIV infection. The antibody tests used fail to confirm the presence of HIV in the accused, no matter how many times performed, because they do not test for the virus.[215] Moreover, the chain of custody and other records necessary to establish reliability may be completely non-existent. Similarly, the clinical evaluation required by service regulations for servicemembers with "laboratory evidence of HIV infection" does not focus on the past to rule out the scores of potential causes of a false-positive result. Instead, it examines sexual habits, collects information about sexual partners, and looks to a future defined by HIV: treatment, counseling, sexual restrictions, and potential legal liability. Identifying the insufficiency of the government's evidence of HIV infection has usually proven to be compelling enough to result in dismissal or acquittal; however, it does not provide a complete defense to all charges, such as assault consummated by battery, orders violations, or attempted aggravated assaults where the accused displayed the specific intent to harm another with HIV.[216] However, the unsettled nature of the

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(HETU) to use the CDC's "Interview Form" for "report[ing] risk and exposure data for patients newly infected with HIV to the [Navy and Marine Corps Public Health Center (NMCPHC)]"); *Comprehensive Interview Record (CIR) Template*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/std/program/forms/cir-2013/cir-2013.pdf (last updated Dec. 29, 2014) (providing detailed questions for doctors to ask new HIV patients, with questions focusing on basic illegal drug-related risk factors and sexual history, but not on overall health history that would encompass illnesses, infections, prescriptions, and nutrition, among others considerations).

[214] Brief in Support of Petition Granted at 8, United States v. Gutierrez, (USCA Dkt. No. 13-0522/AF), Crim. App. No. 37913, *available at* http://www.armfor.uscourts.gov/newcaaf/briefs/2014Term/Gutierrez130522AppellantBrief.pdf (summarizing affidavit of Dr. Banks).

[215] *See* Bauer, *supra* note 93, at 6–8.

[216] Gutierrez, No. 13-0522/AF, slip op. at 16–17 (affirming convictions for the listed offenses).

hypothesis that HIV spreads sexually and is the cause AIDS may eventually reveal an insufficient factual basis and legal justification for even these charges.

3. Comprehensive Challenge for HIV Charges: Non-Infectious AIDS

The lack of evidence that AIDS is both infectious and caused by HIV invites critical examination of the military's legal basis for prosecuting HIV-based offenses. All the HIV-specific charges discussed above rely on the fundamental proposition that HIV is infectious and causes AIDS. If HIV does not cause AIDS, then a person with HIV can engage in consensual sexual activity without fearing that the law will arbitrarily eviscerate that consent based upon a nonexistent threat. If HIV does not cause AIDS, there is no special harm in sexual contact from someone who has HIV antibodies and, therefore, no evidence to support a charge of even simple battery. If HIV does not cause AIDS, there is no valid military purpose for orders restricting the private, consensual activities of servicemembers. If HIV does not cause AIDS, military legal practitioners need to honestly address that issue *now*, lest we spend another generation tinkering with the law—and the lives of servicemembers' and their families—before we realize that there is no factual basis for criminal punishment of someone we now believe to be infected with HIV.

a. Consent & Battery with Unlikely Sexual Transmission of HIV

The increasingly underwhelming evidence that HIV spreads AIDS through sexual acts now means that a servicemember who purportedly has HIV can legally engage in consensual sexual activity and the law will recognize the consent. In the military, "[a] person cannot consent to an act that is likely to result in death or grievous bodily harm."[217] But *Gutierrez* established that

[217] United States v. Gutierrez, 2014 CCA LEXIS 110, at 17 (A. F. Ct. Crim. Ap. Feb. 25, 2014) (citing United States v. Bygrave, 46 M.J. 491, 493 (C.A.A.F. 1997) and quoting United States v. Outhier, 45 M.J. 326, 330 (C.A.A.F. 1996)).

sexual acts are not *per se* likely to spread HIV and thereby cause harm.[218] Moreover, CAAF cited government-sanctioned statistics which support the proposition that *no* sexual medium is *likely* to transmit HIV.[219] Therefore, absent truly extraordinary facts, a servicemember with HIV can engage in perfectly lawful sexual activity with a consenting partner who is aware of his HIV status.

Where the potential for harm is consistently and officially determined to be statistically remote, sexual acts or contact with an HIV-positive servicemember fail to constitute even a battery unless the accused's acts were objectively unlawful. A battery is "bodily harm . . . done with unlawful force or violence."[220] The only basis for establishing "unlawful[ness]" when there is no actual "force or violence" is to show that the accused's violation of the order requiring him to use protection or tell a potential sexual partner that he has HIV somehow affected the legitimacy of the victim's consent. Yet this relies on the pre-*Gutierrez* proposition that sex with an HIV-positive person is an *aggravated assault* and therefore, by definition, without consent. After *Gutierrez*, that proposition is invalid.

By affirming an assault consummated by battery in *Gutierrez*, [221] CAAF seemed to ignore the second element of that offense and the corresponding definition which require that the assault "must be done without legal justification or excuse *and* without the lawful consent of the person affected."[222] Instead, CAAF cited the Canadian Supreme Court to support the assertion that "appellant's conduct included an offensive touching to which his sexual partners did not provide

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[218] *See Gutierrez*, No. 13-0522/AF, slip op. at 8–17.

[219] *See id.* at 12 n.4 (citing CDC statistics).

[220] MCM pt. IV, ¶54b(2).

[221] *Gutierrez*, No. 13-0522/AF, slip op. at 16–17.

[222] MCM pt. IV, ¶54b(2), ¶54c(1)(a).

meaningful informed consent."[223] Because the sex itself was *not* likely to cause harm and was therefore *lawful* given the other person's consent, the victim's lack of knowledge that the accused was infected is irrelevant to the determination of whether there was "unlawful force or violence." Yet CAAF omitted any discussion of this and, instead, apparently construed Gutierrez's failure to provide notice of his HIV status—a violation of his safe sex order—as somehow establishing the "unlawful force or violence" necessary to commit a battery.

To avoid absurd and arbitrary results, an HIV-based battery conviction must be based on an objective order that the accused violated rather than merely a victim's subjective offense at not knowing she had contact with someone who has HIV. Indeed, if CAAF severs its HIV application of assault and battery from the element of "unlawful force or violence" the same way the earlier court severed aggravated assault charges from the statute by creating a wild definition of "likely," then baseless bias and unfounded prejudice will continue to infect military law, which is designed to operate on facts, not fear. Put simply, if the accused does not violate a lawful order by failing to notify a sexual partner of his HIV, he has committed no legal wrong and cannot be punished for a battery, regardless of how offended the victim may later become upon learning that he has HIV.

b. Re-Evaluating the Legitimacy of HIV Safe Sex Orders

After *Gutierrez*, safe sex orders remain relatively untouched, but become increasingly important to other HIV-related charges. Aggravated assault is no longer warranted and knowing consent is valid unless the circumstances indicate show that harm is, in fact, likely. Uninformed consent to sex is apparently prohibited, but this must be based on a legal vitiation of consent due to the HIV-positive servicemember's failure to notify his partner of his HIV infection, as

[223] *Gutierrez*, No. 13-0522/AF, slip op. at 17 (citing R. v. Cuerrier, [1998] 2 S.C.R. 371, 372 (Can.) ("Without disclosure of HIV status there cannot be a true consent.")).

required by his safe sex order. If there is no such order, his partner's whimsical offense is insufficient to later turn their consensual sex into an act of unlawful force. Accordingly, HIV-based safe sex orders now merit renewed attention to determine their continuing validity.

Bowers v. Hardwick shaped military courts' determinations that "safe sex" orders are a constitutional exercise of governmental authority due to valid military interest.[224] *Lawrence v. Texas* overruled *Bowers*, "[holding] that individuals have a liberty interest that protects consensual 'private sexual conduct.'"[225] The Supreme Court identified certain exceptions to this liberty interest to include, "persons who might be injured or coerced or who are situated in relationships where consent might not be easily refused."[226] But "might be injured or coerced" is similar to "likely to produce death or grievous bodily harm."[227] Under each principle, the precautionary government regulation must have a reasonable, logical limit.

To determine whether sexual conduct is constitutionally protected, military courts consider whether the conduct is "of a nature to bring it within the liberty interest identified by the Supreme Court . . . encompass[es] any behavior or factors identified by the Supreme Court as outside the analysis," or involves "additional factors relevant solely in the military environment that affect the nature and reach of the Lawrence liberty interest[.]"[228] These "*Marcum* Factors"

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[224] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); United States v. Womack, 29 M.J. 88, 90 (C.M.A. 1989) (relying upon *Bowers* to find that the charge for forcible sodomy did not interfere with constitutionally-protected private affairs).

[225] United States v. Gutierrez, 2014 CCA LEXIS 110, at 17 (A. F. Ct. Crim. Ap. Feb. 25, 2014) (quoting *Lawrence*, 539 U.S. at 578).

[226] *Id.*

[227] *Compare Lawrence*, 539 U.S. at 578 ("might be injured or coerced"), *with* 10 U.S.C. § 928 (2014) ("likely to produce death or grievous bodily harm").

[228] *See* United States v. Marcum, 60 M.J. 198, 206–07 (C.A.A.F. 2004). The Supreme Court identified several factors that *Lawrence* did not involve: "minors," "persons who might be injured or coerced who are situated in relationships where consent might not easily be refused," and "public conduct or prostitution." *Lawrence*, 539 U.S. at 578. In *Marcum*, CAAF observed that "[t]he Supreme Court did not expressly state whether or not this text

reflect the uncertainty in the constitutional standard applied under *Lawrence*. "[T]he Supreme Court placed *Lawrence* within its liberty line of cases . . . [which treat] aspects of liberty and privacy as fundamental rights, thereby, subjecting them to the compelling interest analysis."[229] However, rather than use "nomenclature associated with strict scrutiny," the Supreme Court used language "typically associated with the rational basis standard of review" by finding that "'the Texas statute furthers no legitimate state interest[.]'"[230] CAAF determined that "[w]hat *Lawrence* requires is searching constitutional inquiry."[231]

When an accused servicemember demands "searching constitutional inquiry" of a charge, he makes "a contextual, as-applied challenge"[232] to the Article at issue. Facial challenges to statutes are to be discouraged and should be used infrequently.[233] As a result, where otherwise consensual acts take place between consenting adults, a successful constitutional challenge must address *all* the logical assumptions underlying HIV/AIDS cases, demonstrate the lack of evidence to support these assumptions, and show that the government has insufficient factual basis for requiring or prohibiting certain conduct at issue in the case.

Safe sex orders involving HIV have dubious legitimacy today because their constitutionality legitimacy relies upon predictions and assertions about HIV and AIDS that we now know to be grossly inaccurate. An effective challenge to HIV-related orders must show the incorrectness of

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represented an exhaustive or illustrative list of exceptions to the liberty intereste identified, whether this text was intended to suggest areas where legislators might affirmatively legislate, or whether this text was intended to do no more than identify areas not addressed by the Court." *Marcum*, 60 M.J. at 203–04.

[229] *Marcum*, 60 M.J. at 204.

[230] *Id.* at 204 (quoting in part *Lawrence*, 539 U.S. at 578).

[231] *Id.* at 205.

[232] *Id.*

[233] *Id.* at 206 (citing Sabri v. United States, 541 U.S. 600 (2004)).

the facts originally justifying the orders by contrasting them with what we know—and don't know—about HIV and AIDS today. Until that happens, CAAF will have no basis to confront the constitutionality of safe sex orders and will likely continue to affirm convictions for orders violation based on an aspect of the accused's conduct that "falls outside the constitutional liberty interest recognized in *Lawrence* . . . and applied to the military justice system through . . . *Marcum* . . . ."[234] To generate the constitutional question, the facts presented in the case must extend beyond the accused's specific HIV statistics to explore the broader lack of proof that HIV causes AIDS. If, during litigation in the case, evidence shows that the infectious hypothesis for AIDS is unproven and unreasonable, the "military purpose" for the HIV-specific order—preventing dangerous or even deadly infectious disease—loses validity. The balance between government and individual liberty interests then tips favor of the servicemember, making his purported HIV infection a legally insufficient basis for the government's restrictive order.

4. Summary

First, *Gutierrez* significantly altered the landscape for HIV cases in the military by finally requiring the government to prove a likely risk of transmission in an aggravated assault. However, *Gutierrez* raises new questions by affirming a conviction for assault consummated by battery without explaining what proved the element of "unlawful force or violence" in light of the court's holding that any potential harm from the accused's consensual sex was too unlikely to constitute a *per se* non-consensual aggravated assault. Second, in recent years, numerous cases have effectively challenged the previously accepted claim that the accused is infected with HIV. By showing that the government's evidence fails to produce reasonable scientific or medical certainty that the accused is infected with HIV, these cases have almost uniformly resulted in

[234] *See, e.g.*, United States v. Gutierrez, No. 13-0522/AF, slip op. at 17 n.7 (C.A.A.F. Feb. 23, 2015) (citing *Lawrence*, 539 U.S. 558; *Marcum*, 60 M.J. 198).

dismissal of charges or findings of not guilty at trial. However, showing a lack of evidence of infection still does not provide a defense to charges involving orders violation or attempted aggravated assault where the accused demonstrated specific intent to infect others with HIV. Finally, challenging the constitutional basis for safe sex orders is the only means of bringing resolution to the continuing legal mess created by the military courts' overly-enthusiastic acceptance of and continued reliance upon the unproven and questionable hypothesis that HIV causes AIDS.

III. Conclusion

A. HIV/AIDS on Parade: An Overview of Significant Points

The strange application of law revealed in the opening vignette represents the precarious nature of the absurd legal creation—HIV charges under the UCMJ—that expanded over decades, producing increasingly absurd results with law that grew stronger even as the facts justifying the law became weaker. Over time, courts ignored the most critical issues in HIV cases because early appellate cases established HIV-specific legal standards and precedents without analyzing and requiring proof of the full chain of inferences necessary to link the accused servicemembers to the spread of AIDS. Today, military legal practitioners are become increasingly aware of key facts that were never known or acknowledged in those early cases: HIV tests do not prove the accused has HIV, the likelihood of infection through sexual contact by the accused is both incredibly small (if not zero) and highly speculative, and HIV has never been proven to be the cause of AIDS. The watershed *Gutierrez* decision recently resolved the most glaring problem by requiring that the government prove the elements of aggravated assault in an HIV case by demonstrated the likelihood that the accused could transmit HIV. In other cases, effective challenges to the proof of the accused's HIV infection raised enough doubt that HIV charges

resulted in dismissal or acquittal. Now, as the facts which gave constitutional sanction to HIV-specific orders increasingly prove to be inaccurate, the situation is ripe for a full, honest, and critical analysis of the hypothesis that HIV is the infectious cause of AIDS. A review of the three key considerations in an HIV case illustrates the need for this comprehensive reconsideration of HIV and AIDS.

First, scientific, medical, and epidemiological advances show that HIV is *not* a means *likely* to cause death or grievous bodily harm. A servicemember's likelihood of infecting others has gone from being so strongly assumed that it was not even quantified or discussed to now being so speculative and remote that even the worst sets of fact produce an estimated risk of HIV transmission that barely exceeds one percent. These likelihoods of transmission have become too obviously attenuated to be ignored. Accordingly, CAAF eliminated the fanciful HIV-specific standard for determining the likelihood of harm and returned to the firm ground of the statute's language.

Second, *HIV* tests are not that; they are *antibody* tests which do not indicate and cannot confirm infection with HIV. Antibody tests are highly sensitive and expressly *not* to be used for diagnostic purposes. So-called "reactive" and "confirmed" results on an antibody test don't "confirm" infection with HIV. A servicemember with "laboratory evidence of HIV infection" requires significant clinical evaluation to rule out the scores of potential causes of false-positives, many of which are common diseases or immunizations. On the basis of laboratory tests alone, disparities between the services' testing protocols mean that a servicemember could be considered infected with HIV in one service, but not infected in another. Yet service regulations uniformly ignore the need to thoroughly assess the servicemember and his medical history *before* determining that he is "HIV positive"; instead, each service immediately focuses on

epidemiological history, preventive counseling, and additional confirmatory testing for the servicemember. However, the clinical "confirmatory" tests are meant only to confirm, never to rule out, infection with HIV. So the servicemember's status as HIV infected is *never* questioned from the moment he steps into the medical facility for "clinical evaluation." Today, the uncertainty of antibody tests, the lack of clinical confirmation, and the inability to prove infection with HIV fundamentally undermine the allegation that the accused is infected with HIV. The facts and questions about HIV testing, and the lack of medical diagnosis in the military, need to be fully developed so courts can accurately evaluate whether sufficient evidence exists to prove beyond a reasonable doubt *any* charge involving HIV.

Third, HIV is not proven to cause AIDS. This is the ultimate issue upon which every HIV case stands or falls. This issue is hinted at by the lack of evidence to support both HIV infection of the accused and the likelihood of transmission to another. However, questioning the infectious/HIV cause of AIDS is anathema. This question contradicts the global HIV/AIDS establishment, which includes governments, academia, and the pharmaceutical industry. It contradicts decades of aggressive policy within the Department of Defense and military services. And until recently, it directly contradicted some of the strongest language on record from military appellate courts. But CAAF recently corrected significant legal errors which, with the right facts before it, became apparent. As future cases present additional facts that directly contradict the HIV/AIDS hypothesis, military lawyers and judges must have the judgment and moral courage to critically analyze the evidence relating to HIV, even when it challenges entrenched personal beliefs or contradicts government-sponsored policies, programs, and propaganda by revealing more of the gap between presumed HIV infection and AIDS.

The HIV/AIDS hypothesis has enjoyed such mystique and monolithic status that revelations of such gaps come as a surprise and even a shock—like suddenly seeing a naked person in public. Such an experience would be disturbing, but even more so if the naked person had all the trappings of officialdom (except clothes), to include throngs of enthusiastic, loyal subjects. Yet if, over time, the royal retinue and fawning subjects unceasingly praise the latest vestments on display and explain how they are even more fine, nuanced, and amazing than before, that still does not change our observation and awareness that the person has no clothes. We may expect that someone will speak up and stop this nonsense. But what if those people already did speak up, and were silenced, excluded, or intimidated into submission to deter others from doing the same? If what we see and experience differs so much from the loudest voices in the crowd, it is time to not only approach the apparently naked HIV emperor, but also to manhandle and inspect his "clothes."

B. Observation, Analysis, and Decision: Thesis Statement Application

As the military's specialized legal standards increasingly expose the incorrectness and inadequacy of the facts that built the law military's HIV law, those with legal responsibilities in the military must critically examine, question, and challenge the hypotheses, technologies, factual presumptions, and legal standards which define HIV cases. Cases involving allegations of HIV infection cannot be accurately prosecuted or zealously defended without an understanding of the critical assumptions in the logical chain linking the accused's body with AIDS. Each of those assumptions—that the accused has HIV, that he can infect others with it, and that HIV causes AIDS and death—is a highly complicated proposition that is the subject of significant scientific and medical dispute. The DoD's policies exclusively follow the CDC-endorsed interpretations of those issues and assumptions. But military courts should not blindly

accept the interpretations, explanations, and policy diktats of other bureaucratic agencies, particularly when the courts themselves become keenly aware of an awkward gap between increasingly weak facts and a set of unusually strong law. However, because courts can only recalibrate the law based upon the facts of individual cases and controversies, they need a record—built by facts and reliable evidence—that lets them know "the rest of the story."[235]

C. Manhandling the Emperor: Recommended Action

Anyone who has read to this point in this paper should realize that understanding the issues relating to HIV, AIDS, and their proposed causative nexus will require far more information than this paper can provide. This paper only touches the wave tops to provide perspective and context to the reader. Further study into the history, development, and myriad multi-disciplinary intricacies of HIV and AIDS will fascinate, frustrate, aggravate, inform, inspire, and completely astound any sincere seeker of truth. The first recommendation is simply an invitation to study HIV/AIDS, particularly the dissenting views which are generally unknown, yet more readily available than most of the mainstream literature about HIV/AIDS.

Those with legal responsibilities outside the courtroom, such as staff judge advocates and convening authorities, need to appreciate the increasing technical and factual complexities of modern HIV cases. Though these cases routinely resulted in guilty pleas and unimpressive sentence limitations years ago, that should never be the case today. Though they previously involved just a single HIV "expert," today, provision of one notional expert on the overall issue of "HIV" is inadequate for proper defense *or* prosecution of an HIV case. Increased discovery requirements, expert witness and/or consultant requirements, and potential media attention will require substantial time, money, and effort to produce a case where the government's HIV

[235] Credit to Paul Harvey for immortalizing these words in his radio broadcasts.

evidence is still likely to be inadequate and riddled with doubt after thorough testing, evaluation, and treatment by a capable defense team. Given the sweeping change announced in *Gutierrez* and attendant uncertainty around some of the issues that were not directly resolved, recognition that defense teams in recent cases have successfully challenged the "fact" of the accused's HIV infection should at least give the convening authority pause before needlessly put a servicemember through the court-martial process—further stigmatizing him—only to have the case result in an acquittal because the facts are legally insufficient to prove beyond a reasonable doubt that the servicemember violated the UCMJ by his or her conduct while "infected" with HIV. The following paragraphs discuss these points in to highlight additional considerations for counsel assigned to HIV cases.

First, counsel on an HIV case must be willing to consider a wide array of factual issues involved in the case, particularly as it relates to experts and discovery. In an aggravated assault case, under CAAF's clear requirement for proof announced in *Gutierrez*, government counsel must muster and present the witnesses, experts, and evidence to prove likelihood of transmission, at a minimum. Similarly, defense counsel must identify the gaps in the HIV evidence offered to establish guilt and identify the various types of expert assistance required. In any HIV case, counsel on both sides must thoroughly analyze and question all the assumptions about HIV and AIDS as they relate to the accused's case.

Second, counsel on an HIV court-martial must recognize that HIV "experts" who normally testify in HIV cases as the sole authority typically have a relatively narrow scope of expertise and are often unaware of the significant scientific questions hanging over HIV and AIDS. The issues in HIV cases lie beyond the expertise of a single person: scientific issues relating to the lab tests and procedures used or potentially available in an HIV case (to include ELISA, WB,

PCR, and even EM); medical issues relating to the clinical determination of HIV infection and subsequent evaluation involved in competent and comprehensive treatment of disease; and the many scientific issues relating to the evidence or lack of evidence that HIV causes AIDS. Counsel must identify experts who understand both the orthodox and unorthodox ideas relating to their respective area(s) of expertise. A defense expert who only knows the government-sanctioned theories about HIV/AIDS is of little use to a defense team that is challenging the government's ability to prove foundational assumptions about HIV and AIDS.

Third, technical and medical discovery must be complete early in the trial process, to include all records of specimen shipment and handling, chain of custody, quality control, and qualitative or quantitative results for all initial and confirmatory tests administered by the laboratory. This also needs to include the same types of records for all subsequent follow-up or confirmatory tests, such as "viral load" or PCR tests. Medical records must include not just the accused's counseling about HIV, epidemiological assessment, and a complete medical history, going from the present to the beginning of his military service. In cases with junior servicemembers, even pre-service medical and immunization records may be necessary to conduct a thorough medical analysis of factors that may have caused false-positive laboratory evidence of HIV infection.

Substantively, an accused and his counsel should determine how broadly they will challenge the assumptions and inferences underlying HIV/AIDS. First, pleading guilty in HIV cases should remain a thing of the past. Today, both the law and the facts surrounding HIV are highly unstable and replete with opportunity for continued questioning and shaping. Second, the simplest challenge uses the government's expert to reveal the low likelihood that the accused's actions can cause harm based on the accused's "viral load" and the type of sexual act. But this evidence will only defeat an aggravated assault charge, not a battery or attempted aggravated

assault charge. It also concedes all the assumptions about HIV/AIDS and continues to validate the inappropriate quantitative use of PCR for supposedly counting the virus level in the accused's blood. Third, the modern challenge is to start where the accused did with HIV: testing and clinical evaluation. By showing that the government cannot prove beyond a reasonable doubt that the accused is infected with HIV, this strategy concedes nothing and has proven to be effective at preventing convictions on HIV-based charges. However, even if the government cannot verify that the accused is infected with HIV, the accused could still be convicted for an orders violation or aggravated assault under an attempt theory. Finally, the comprehensive challenge of the HIV/AIDS causative nexus must attack the constitutional basis for regulating and punishing HIV-based conduct by combining the modern-day statistics showing the low risks of sexual transmission of HIV with the attenuated evidence that the accused has even has HIV. With a robust set of facts about HIV and AIDS that has been vigorously tested in the adversarial process, military appellate courts can continue the gradual process of recalibrating and correcting the law which CAAF started in *Gutierrez*.

Thus, modern courts-martial increasingly expose the HIV emperor's lack of clothing. That nakedness will probably not be fully acknowledged by society or government at large in the near future, but people from many different perspectives are starting to become uncomfortable with the large amounts of flesh they see through the confusion and complexity of the thronging crowd. Elected officials and AIDS advocates see hints of nakedness in the arms as they recognize that criminalizing the actions of people with HIV does not advance the broader political objectives of encouraging widespread and frequent HIV testing, incentivizing safe sexual practices through non-coercive means, and providing equal treatment for all in a way that

does not stigmatize based upon a disability such as HIV infection.[236] Scholars and lawyers see the exposed head and chest as they recognize logical and due process problems with using existing basic criminal laws to prosecute individual's for crimes based on the HIV infection of an indidual.[237] Anyone who is very concerned about sexual assault would see straight to the emperor's exposed genitals and naturally feel outrage at the thought that HIV law has, until recently, awkwardly allowed complete role reversals between a victim and perpetrator of sexual assault.[238] And the military's appellate courts have finally spoken up to say that there is simply way too much skin showing in real HIV cases to continue pretending that the emperor is heavily and ornately clothed, as previously believed.

The HIV emperor's loyal subjects who have been at this parade for years may be oblivious to his nakedness or even deeply invested in the sophisticated technology used by the tailors to make his uniquely complex and very expensive clothes. They may be convinced that his nakedness is actually attributed to skin-toned, form fitting clothing. They are certainly not interested in allowing up-close, hands-on verification or in entertaining questions about the technical details of the clothes. But if judge advocates start to speak up, dig deep, and ask hard questions in HIV-based court-martial proceedings, others may start to connect their general feelings of discomfort about HIV with the revealing glimpses they have had and bring themselves to ask if, indeed, the HIV emperor has no clothes. In the process of seeking the truth and doing justice in a court-

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[236] *See National HIV/AIDS Strategy for the United States*, OFFICE OF NATIONAL AIDS STRATEGY 31–39 (July 2010), *available at* https://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf.

[237] See Ari E. Waldman, *Exceptions: The Criminal Law's Illogical Approach to HIV-Related Aggravated Assaults*, 18 VA. J. SOC. POL'Y & L. 550, 591 (2011).

[238] *See, e.g.*, discussion *supra* Part I.

martial, judge advocates may play some small role in eliminating HIV as "the greatest impediment to solving the problem of AIDS."[239]

[239] *Commentary on The Emperor's New Virus?*, THE PERTH GROUP (Sep. 20, 2011), http://www.theperthgroup.com/OTHER/ENVCommentary.pdf.